

REPORTS OF CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

JANUARY TERM, 1902.

VOLUME LXIV.

LEE HERDMAN,

OFFICIAL REPORTER.

LINCOLN, NEBR.:
STATE JOURNAL COMPANY, LAW PUBLISHERS

1903.

Entered according to act of Congress in the office of the Librarian of Congress,

A. D. 1903,

BY LEE HERDMAN, REPORTER OF THE SUPREME COURT,

In behalf of the people of Nebraska.

SUPREME COURT OF NEBRASKA

DURING THE
PERIOD AND PREPARATION OF THIS REPORT.

CHIEF JUSTICE AND JUDGES.

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DISTRICT COURTS OF NEBRASKA.

JUDGES.

First District—

CHARLES B. LETTON.....Fairbury
JOHN S. STULL Auburn

Second District—

PAUL JESSEN Nebraska City

Third District—

ALBERT J. CORNISH.....Lincoln
LINCOLN FROST Lincoln
EDWARD P. HOLMES.....Lincoln

Fourth District—

IRVING F. BAXTER.....Omaha
CHARLES T. DICKINSON.....Tekamah
LEE S. ESTELLE Omaha
JACOB FAWCETT Omaha
WILLIAM W. KEYSOR*.....Omaha
GUY R. C. READ†.....Omaha
WILLARD W. SLABAUGH.....Omaha

Fifth District—

BENJAMIN F. GOOD.....Wahoo
SAMUEL H. SORNBORGER Wahoo

Sixth District—

JAMES A. GRIMISON Schuyler
CONRAD HOLLENBECK Fremont

Seventh District—

GEORGE W. STUBBS.....Superior

Eighth District—

GUY T. GRAVES.....Pender

Ninth District—

JAMES F. BOYD.....Neligh

* Has been succeeded by George A. Day.

† Succeeded Benjamin S. Baker.

DISTRICT COURTS OF NEBRASKA.

v

Tenth District—

ED L. ADAMS.....Minden

Eleventh District—

JAMES N. PAUL*.....St. Paul

JOHN R. THOMPSON.....Grand Island

Twelfth District—

HOMER M. SULLIVAN†.....Broken Bow

Thirteenth District—

HANSON M. GRIMES.....North Platte

Fourteenth District—

GEORGE W. NORRIS‡.....McCook

Fifteenth District—

JAMES J. HARRINGTON.....O'Neill

WILLIAM H. WESTOVER.....Rushville

*Succeeded Charles A. Munn.

†Resigned February 3, 1903; resignation accepted February 4; Charles L. Gutter-
son appointed successor same date.

‡Elected to Congress from fifth district November 4, 1902. Resigned as judge
February 12, 1903; resignation accepted February 14; Robert C. Orr appointed suc-
cessor February 21.

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REPORTER'S NOTES.

The supreme court of Nebraska has repeatedly held the Carlisle table admissible in evidence. *King v. Bell*, 13 Nebr., 409; *City of Lincoln v. Smith*, 28 Nebr., 762; *City of Friend v. Ingersoll*, 39 Nebr., 717.

While the present deputy reporter was at the head of the insurance bureau, afterwards declared unconstitutional in *State, ex rel. Cornell, v. Poynter*, 59 Nebr., 417, he issued a circular containing four expectancy tables. This circular was revised on a suggestion of Hon. John J. McCarthy and verified with the assistance of Miss Edith Long, instructor in mathematics in the Lincoln high school. Its author now offers it editorially for the use of the bar. These tables have been carefully compared by the editor with the publications of Flitcraft, Meech and Scribner.

Expectancy of life is the length of time for which a person, at a given age, may reasonably expect to survive. This estimation is determined from careful observations made of births and deaths. For example, out of a given number of births, a certain percentage of persons born survive for one year; a certain percentage for two years, and so on, *seriatim*. By striking an average, the reasonable expectancy of life for any given age is arrived at. When expectancies thus found are tabulated, they constitute a life expectancy table. The whole system is based on Pascal's Science of Probabilities.

An authenticated and trustworthy life expectancy table is, in a proper case, competent though not conclusive evidence. Such a table is of value in many ways. For example, if a widow were suing for damages under the Ames Law (Compiled Statutes, ch. 50), any person at fault for the loss of her husband, she would first prove his net earning capacity for one year. This, multiplied by his expectancy of life in years, would be the prima-facie measure of her pecuniary damages. For example, his age is 51 years; his expectancy is 20.20 years; his earning capacity is \$1,500 annually; $\$1,500 \times 20.20$ equals \$30,300. Thirty thousand three hundred dollars, at its present worth—\$18,454.04—might be the measure of one element of her damages.

The use of life expectancy tables by insurance men is for the purpose of an equitable adjustment of premiums. The intention is to require every man to pay the same sum for the same amount

of insurance. If the sum which he is to pay is divided by the number of years of his life expectancy, the quotient will be the amount of his yearly premium. For example, it is the purpose of the insurance company to collect \$600 for \$1,000 of insurance; A is 34 years old; his life expectancy is 32.50 years; \$600 divided by 32.50 equals \$18.46. B is 39 years old; his life expectancy is 28.90 years; \$600 divided by 28.90 equals \$20.76. So B has no advantage over A in deferring his insurance for five years. This is what is meant by the equitable adjustment of premiums.

These tables are of commercial use to determine the value of a life estate, and might be used by appraisers at a judicial sale.

The Northampton table was deduced by Doctor Richard Price from the burial registers (1735 to 1780) of All Saints' Church, Northampton. This was practically displaced by the Carlisle table.

The Carlisle table was named from the municipal parish of Carlisle in England, and was prepared by Mr. Joshua Milne, an English actuary, from materials furnished by Doctor John Heysham, a physician of Carlisle, who for nine years (1779 to 1787) kept careful records of births and deaths in the parishes of St. Mary and St. Cuthbert, in the county of Cumberland.

In America, the Carlisle table has been superseded by the American and Actuaries', for it appears that since the formulation of the Carlisle table, antiseptic surgery, quarantine, and an improved pharmacopœia have increased the average length of human life.

There are two or three fractional variations between the figures of different actuaries; and, in such cases, I have selected the figures most consistent with a regularly graduated scale. None of these variations exceed 10 per cent. of one year.

REPORTER'S NOTES.

EXPECTANCY OF LIFE FROM 10 TO 95 YEARS.

Age	Actuaries'	American	Carlisle	North-ampton	Age	Actuaries'	American	Carlisle	North-ampton
10	48.36	48.72	48.82	39.78	55	18.86	17.40	17.58	15.58
11	47.68	48.08	48.04	39.14	56	16.22	16.72	16.89	15.10
12	47.01	47.45	47.27	38.49	57	15.59	16.05	16.21	14.63
13	46.33	46.80	46.51	37.83	58	14.97	15.39	15.55	14.15
14	45.64	46.16	45.75	37.17	59	14.37	14.74	14.92	13.68
15	44.96	45.50	45.00	36.51	60	13.77	14.10	14.34	13.21
16	44.27	44.85	44.27	35.85	61	13.18	13.47	13.82	12.75
17	43.58	44.19	43.57	35.20	62	12.61	12.86	13.31	12.28
18	42.88	43.53	42.87	34.58	63	12.05	12.26	12.81	11.81
19	42.19	42.87	42.17	33.99	64	11.51	11.67	12.30	11.35
20	41.49	42.20	41.46	33.43	65	10.97	11.10	11.79	10.88
21	40.79	41.53	40.75	32.90	66	10.46	10.54	11.27	10.42
22	40.09	40.85	40.04	32.39	67	9.96	10.00	10.75	9.96
23	39.39	40.17	39.31	31.88	68	9.47	9.47	10.23	9.50
24	38.68	39.49	38.59	31.36	69	9.00	8.97	9.70	9.05
25	37.98	38.81	37.86	30.85	70	8.54	8.48	9.18	8.60
26	37.27	38.12	37.14	30.33	71	8.10	8.00	8.65	8.17
27	36.56	37.43	36.41	29.82	72	7.67	7.55	8.16	7.74
28	35.86	36.73	35.69	29.30	73	7.26	7.11	7.72	7.33
29	35.15	36.03	35.00	28.79	74	6.86	6.68	7.33	6.92
30	34.43	35.33	34.34	28.27	75	6.48	6.27	7.01	6.54
31	33.72	34.63	33.68	27.76	76	6.11	5.88	6.69	6.18
32	33.01	33.92	33.03	27.24	77	5.76	5.49	6.40	5.83
33	32.30	33.21	32.36	26.72	78	5.42	5.11	6.12	5.48
34	31.58	32.50	31.68	26.20	79	5.09	4.74	5.80	5.11
35	30.87	31.78	31.00	25.68	80	4.78	4.39	5.51	4.75
36	30.15	31.07	30.32	25.16	81	4.48	4.05	5.21	4.41
37	29.44	30.35	29.64	24.64	82	4.18	3.71	4.93	4.09
38	28.72	29.62	28.96	24.12	83	3.90	3.39	4.65	3.80
39	28.00	28.90	28.28	23.60	84	3.63	3.08	4.39	3.58
40	27.28	28.18	27.61	23.08	85	3.36	2.77	4.12	3.37
41	26.56	27.45	26.97	22.56	86	3.10	2.47	3.90	3.19
42	25.84	26.72	26.34	22.04	87	2.84	2.18	3.71	3.01
43	25.12	26.00	25.71	21.54	88	2.59	1.91	3.50	2.86
44	24.40	25.27	25.09	21.03	89	2.35	1.66	3.47	2.68
45	23.69	24.54	24.46	20.52	90	2.11	1.42	3.28	2.41
46	22.97	23.81	23.82	20.02	91	1.89	1.19	3.26	2.09
47	22.27	23.08	23.17	19.51	92	1.67	.98	3.37	1.75
48	21.56	22.36	22.50	19.00	93	1.47	.80	3.48	1.37
49	20.87	21.63	21.81	18.49	94	1.28	.64	3.53	1.05
50	20.18	20.91	21.11	17.99	95	1.12	.50	3.53	.75
51	19.50	20.20	20.39	17.50					
52	18.82	19.49	19.68	17.02					
53	18.16	18.79	18.97	16.54					
54	17.50	18.09	18.28	16.06					

Attest: WILBUR F. BRYANT.

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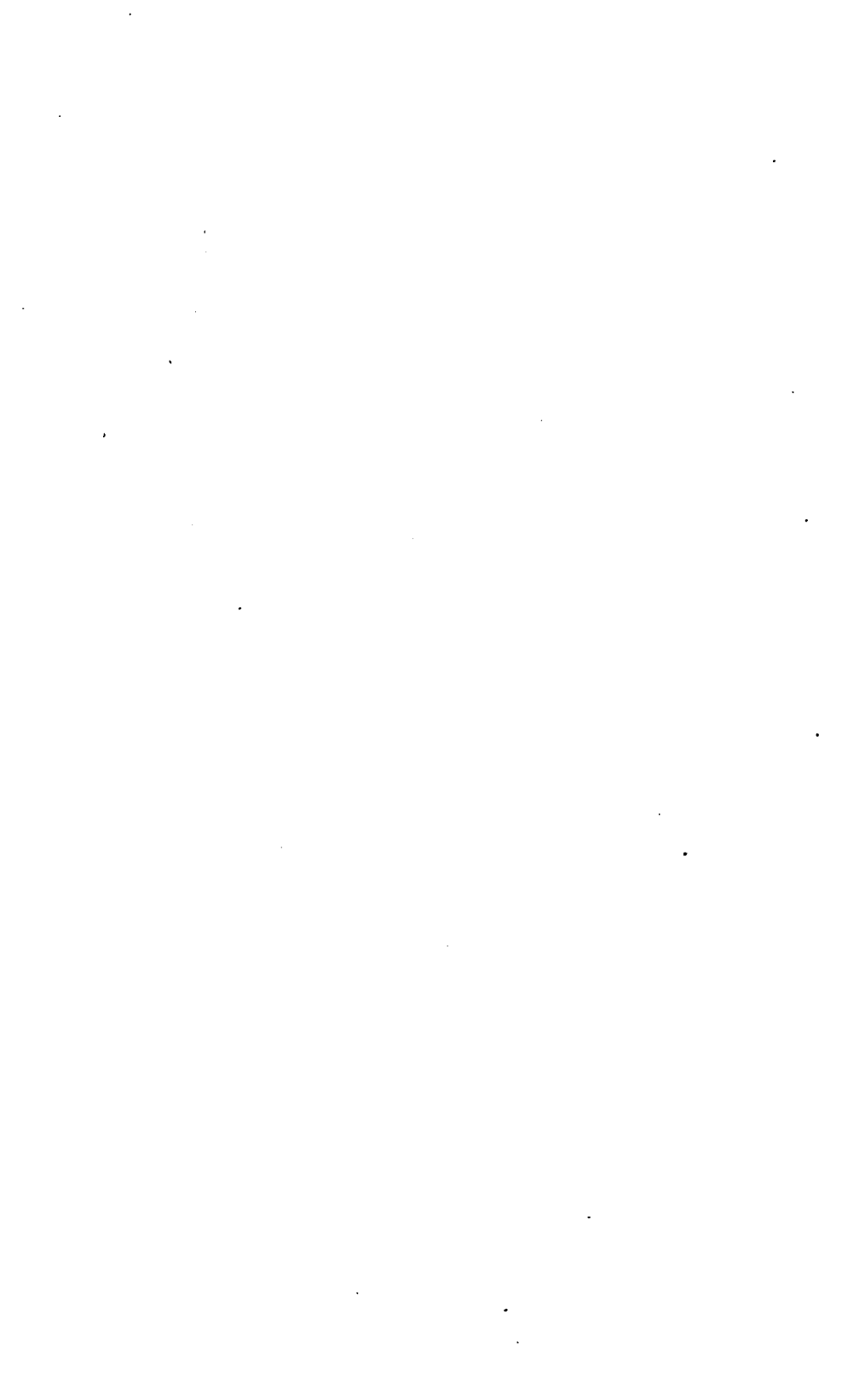
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Digest of Nebraska Cases Overruled, Modified, Distinguished, Negatived and To Be Compared.

NOTE.—The insertion in the following list of a case from another state would necessitate a change in the foregoing title; hence this note. An act of the legislature of Ohio, adopted in 1835, provided "That if any person shall purposely, and of deliberate and premeditated malice, or in the perpetration,* or attempt to perpetrate any rape, arson, robbery or burglary, or by administering poison, or causing the same to be done, kill another; every such person shall be deemed guilty of murder, in the first degree," etc. In 1857 the supreme court of the state construed that statute, holding the adverb "purposely," as a modifier of the verb "kill," to apply to every intervening clause; opinion by Bartley, C. J., *Robbins v. State*, 8 Ohio St., 131, 175. The effect was to make intent a necessary ingredient of murder in both degrees.† In 1873 the Ohio law became ours by adoption. Criminal Code, sec. 3; amended in 1893. In 1897 our supreme court held that our legislature, in adopting the Ohio law, did not adopt the construction of her court, but that such decision stood—on a par with any decision of our own court—subject to revision; and they then and there overruled it; opinion by Post, C. J., *Morgan v. State*, 51 Nebr., 672,‡ overruling *Franklin v. Kelly*, 2 Nebr., 79, 104, par.

*A gross syntactical error; it has been corrected in Ohio and Indiana.—W. F. B.

†It might be a question as to how many *dicta* are in Judge Bartley's opinion. Most of his reasoning appears to be logically essential to the conclusion reached. The question involved was the same as in *Bechtelheimer v. State*, cited in a following note.

In the statute as quoted by Chief Justice Bartley in *Robbins v. State*, *supra*, 8 Ohio State, p. 131, a comma follows the word "purposely." The learned chief justice, in commenting on the section quoted, probably alludes to this comma when he speaks—on page 175—of the "authoritative punctuation of the statute." The original act, approved March 7, 1835, had no such comma. The aforesaid comma was inserted by Joseph Rockwell Swan in his compilation of 1841.—W. F. B.

‡The enactment of a law in terms similar to the provisions of the statute of a foreign country, does not involve the adoption of the construction which the courts of that country may have given the statute. Hemphill, C. J., *Snoddy v. Cage*, 5 Tex., 106; but see vigorous dissent by Wheeler, J.—W. F. B.

3 syllabus in *Hallenbeck v. Hahn*, 2 Nebr., 377, *O'Dea v. Washington County*, 3 Nebr., 118, *Bohanan v. State*, 18 Nebr., 57, 73, 74, *Parks v. State*, 20 Nebr., 515, 518, *Coffield v. State*, 44 Nebr., 417, 423, and *Forrester v. Kearney Nat. Bank*, 49 Nebr., 655, 663,* and it is a mistake to say, as has been said, that these decisions are modified by *Nebraska Building & Loan Ass'n v. Marshall*, 51 Nebr., 534, 538. *Morgan v. State* is upheld in *Rhea v. State*, 63 Nebr., 461, 467, opinion by HOLCOMB, J. On a motion for rehearing, SEDGWICK, J., filed a memorandum dissenting from the opinion of the majority of the court. This will be found in Appendix A to volume 64. "It is a settled rule that in the adoption of the statute of a sister state the state adopting it adopts the construction which the former has placed upon it." ALBERT, C., *State v. McBride*, 64 Nebr., 547, 549. In *Goble v. Simeral*, filed January 21, 1903, POUND, C., states the rule as follows: "If a statute adopted from another state had been construed by the courts of that state prior to its adoption here, the same construction should be given ordinarily in this state in the absence of any indication of a contrary intention on the part of the legislature." The Ohio decision† is mentioned with disapproval in a dictum by the Oregon supreme court; opinion by Kelly, C. J., *State v. Brown*, 7 Ore., 186, 197. Hon. John A. Ehrhardt, of Stanton, has made a valuable suggestion as to this list, which will be followed in the 65th volume.—W. F. B.

* The principle of these cases is recognized, tacitly, by NORVAL, C. J., in *State v. Poynter*, 59 Nebr., 417, 430.—W. F. B.

† A statute substantially identical with the Ohio statute cited above, was enacted in Indiana, 1843. The compiler of that year says, in a note, that the section was "taken substantially from the Ohio statute." Revised Statutes, 1843, p. 960. This was fourteen years before the statute was construed by the Ohio court. The construction in Indiana, taken in the aggregate, differs widely from Ohio. "A purpose to kill is an essential ingredient in the crime of murder in the first degree, where the killing is effected by administering poison." *Bechtelheimer v. State*, 54 Ind., 128, citing the Ohio decision with approval, at page 136. "Where, in the perpetration of a robbery, the robber takes the life of his victim, he is guilty of murder in the first degree, though there may have been no intent to kill." *Moyrihan v. State*, 70 Ind., 126. The former decision was in 1876; the latter four years thereafter. Worden, C. J. in the former. J. in the latter, delivered the respective opinions. Judge SEDGWICK points out the inconsistency of these two decisions—Appendix A. It may not be out of place to state succinctly the two rules of construction.

Ohio rule.—A purpose to kill the person named in the indictment as deceased, is an essential element of murder in any degree.

Indiana rule.—A purpose to kill is an essential element of murder, except where the slayer was engaged in the perpetration or attempt to perpetrate a rape, a robbery, an arson or a burglary, in which case the enormity of the cardinal felony takes the place of the purpose to kill.—W. F. B.

EXPRESSLY PARTIALLY OVERRULED.

Adams v. Nebraska City Nat. Bank, 4 Nebr., 370.

Chattel mortgage. Title to property passes to mortgagee.

Musser v. King, 40 Nebr., 892.

Latter case upheld in Randall v. Persons, 42 Nebr., 607; Sharp v. Johnson, 44 Nebr., 165; Camp v. Pollock, 45 Nebr., 771.

Murray v. Loushman, 47 Nebr., 256.

Strable v. First Nat. Bank of Stanton, 47 Nebr., 319.

Title to property remains in mortgagor.

Alter v. Bank of Stockham, 51 Nebr., 797.

Alter v. Bank of Stockham, 53 Nebr., 223.

Fraud. Conversion.

Aultman v. Obermeyer, 6 Nebr., 260.

Lipscomb v. Lyon, 19 Nebr., 511.

Woodruff v. White, 25 Nebr., 745.

Stevens v. Carson, 30 Nebr., 544, 551.

Good faith of transaction between husband and wife.

Bankers' Life Ins. Co. v. Robbins, 53 Nebr., 44.

Section 8, chapter 16, Compiled Statutes, does not apply to domestic insurance companies. ©

Bankers' Life Ins. Co. v. Robbins, 55 Nebr., 117.

Section 8, chapter 16, does apply to domestic insurance companies.

Bollman v. Lucas, 22 Nebr., 796.

Sunday Creek Coal Co. v. Burnham, 52 Nebr., 364.

Fraudulent conveyance. Guilty knowledge of purchaser.

Brooks v. Dutcher, 22 Nebr., 644.

City of Omaha v. Richards, 49 Nebr., 244.

A general and a specific exception to instructions.

Carkins v. Anderson, 21 Nebr., 364.

Anderson v. Carkins, 135 U. S., 483.

Robinson v. Jones, 31 Nebr., 20.

Homestead. Prior contract to convey after having acquired title. Estoppel.

Cheney v. Harding, 21 Nebr., 68.

Rowe v. Griffiths, 57 Nebr., 488.

Failure to file affidavit before service by publication.

Courcamp v. Weber, 39 Nebr., 533.

Dorsey v. Conrad, 49 Nebr., 443.

Alteration of instruments. Presumption.

Crook v. Vandervoort, 13 Nebr., 505.

Mattis v. Boggs, 19 Nebr., 698, 703.

Latter case reaffirmed in Kirk v. Bowling, 20 Nebr., 260.

Johnson v. Hardy, 43 Nebr., 368.

Ejectment by tenant in common.

Curten* v. Atkinson, 29 Nebr., 612.

Curtin* v. Atkinson, 36 Nebr., 110.

Parties to error proceeding in supreme court.

Darst v. Levy, 40 Nebr., 593.

McCord v. Bowen, 51 Nebr., 247, 251.

Attachment. Chattel mortgage. Rights of mortgagor.

Drexel v. Richards, 48 Nebr., 732.

Drexel v. Richards, 50 Nebr., 509.

Mechanic's lien. Description of real estate.

Farmers' Mutual Ins. Co. v. Phoenix Ins. Co., June 4, 1902.

Farmers' Mutual Ins. Co. v. Phoenix Ins. Co.,
May 20, 1903.

Judgment on insurance policy.

First Nat. Bank of Chadron v. Engelbercht, 57 Nebr., 270.

First Nat. Bank of Chadron v. Engelbercht, 58
Nebr., 639, 640.

Mortgage foreclosure.

First Nat. Bank of Omaha v. Goodman, 55 Nebr., 409.

First Nat. Bank of Omaha v. Goodman, 55 Nebr.,
418.

Liability of wife as surety for husband.

Gee Wo v. State, 36 Nebr., 241.

O'Connor v. State, 46 Nebr., 157, 158.

Negative averment in criminal information.

Geisler v. Brown, 6 Nebr., 254.

World Publishing Co. v. Mullen, 43 Nebr., 126.

Language libelous per se.

Grant v. Bartholomew, 57 Nebr., 673,

County of Logan v. Carnahan, December 17, 1902.

The former holding was that a county could maintain a foreclosure of a tax lien without the prior issuance of a certificate; this was overruled in effect in the latter opinion, and formally overruled on rehearing June 3, 1903.

*This is the same case, but the names are spelled differently in the two reports.—W. F. B.

Henry v. Vliet, 33 Nebr., 130.

Henry v. Vliet, 36 Nebr., 138.

Precedent debt as consideration for chattel mortgage.

Hoadley v. Stephens, 4 Nebr., 431.

Omaha Real Estate & Trust Co. v. Kragscow, 47
Nebr., 592.

Acknowledgment of a deed in another state before a commis-
sioner for this state.

Hollenbeck v. Tarkington, 14 Nebr., 430.

(Phenix Ins. Co. v. Swantkowski, 31 Nebr., 245.)

Sharp v. Brown, 34 Nebr., 406.

Limitation of proceeding in error.

Johnson v. First Nat. Bank of Plum Creek, 28 Nebr., 792.

Dorsey v. Conrad, 49 Nebr., 443, 444.

Alteration of negotiable instrument.

Kittle v. De Lamater, 3 Nebr., 325.

Smith v. Columbus State Bank, 9 Nebr., 31.

Promissory note. Illegal consideration. Innocent purchaser.

La Flume v. Jones, 5 Nebr., 256.

Burkett v. Clark, 46 Nebr., 466, 468, 475.

Judicial sale. Redemption. Deposit.

Lancaster County Bank v. Horn, 34 Nebr., 742.

Sager v. Summers, 49 Nebr., 459.

Voluntary assignment.

Lee v. Hastings, 13 Nebr., 508.

Sureties on replevin bond are not liable in a case in which a
return of the property can be had.

Ulrich v. McConaughy, 63 Nebr., 10, 13.

"We think, in the light of the opinion in that case [*Sheidy v.*
McQuillan, 59 Nebr., 158], *Lee v. Hastings* should not be followed."

Lewis v. Mills, 47 Nebr., 910.

Barker v. Wheeler, 60 Nebr., 470, 471.

Res judicata. Judgment upon officer's bond.

McCord v. Krause, 36 Nebr., 764.

McCord v. Bowen, 51 Nebr., 247, 251.

Attachment. Chattel mortgage.

McCord v. Weil, 29 Nebr., 682.

McCord v. Weil, 33 Nebr., 868, 869.

Latter case reaffirmed in *Seeds Dry-Plate Co. v. Heyn Photo-*
Supply Co., 57 Nebr., 214, 217.

Review of order appointing receiver in advance of main case.

Magneau v. City of Fremont, 30 Nebr., 843.

State v. Boyd, 63 Nebr., 829.

Rosenbloom v. State, 64 Nebr., 342.

See Templeton v. City of Tekamah, *infra*.

Manly v. Downing, 15 Nebr., 637.

Green v. Sanford, 34 Nebr., 363.

Limitation of foreclosure of mechanic's lien.

Marvin v. Weider, 31 Nebr., 774.

Perry v. Baker, 61 Nebr., 841, 845.

Law of the case as a rule in district court.*

Moore v. Kepner, 7 Nebr., 291.

Lininger v. Raymond, 9 Nebr., 40.

Judgment against surety on replevin bond.

O'Dea v. Washington County, 3 Nebr., 118.

See note at the head of this digest of cases.

Omaha & R. V. R. Co. v. Wright, 47 Nebr., 886.

Omaha & R. V. R. Co. v. Wright, 49 Nebr., 456,
457.

Pleading negligence.

Omaha Consolidated Vinegar Co. v. Burns, 44 Nebr., 21.

Omaha Consolidated Vinegar Co. v. Burns, 49
Nebr., 229.

Mechanic's lien for sinking well.

Osborne v. Canfield, 33 Nebr., 330.

Moline v. Curtis, 38 Nebr., 520, 534.

Bill of exceptions on review of attachment proceeding in county
court.

Pacific Express Co. v. Cornell, 59 Nebr., 364.

Nebraska Telephone Co. v. Cornell, 59 Nebr., 737.

Maximum rate law.

Richards v. State, 22 Nebr., 145.

Horbach v. City of Omaha, 49 Nebr., 851.

Latter case reaffirmed in Mathews v. Mulford, 53 Nebr., 252, 253.

Extension of time for filing bill of exceptions.

Richardson v. Campbell, 34 Nebr., 181.

Havemeyer v. Paul, 45 Nebr., 373, 374.

Latter decision reaffirmed in Omaha Loan & Trust Co. v. Han-
son, 46 Nebr., 876, and in Connecticut Mutual Life Ins. Co. v. West-
erhoff, 58 Nebr., 379, 383.

Contract rate of interest after maturity.

*The case of *Perry v. Baker* established a rule for the district court, which differs from the rule established by a long line of decisions for the supreme court.—W. F. B.

Russel v. Rosenbaum, 24 Nebr., 769.

Aultman v. Martin, 49 Nebr., 103.

Separate assignments of error in the giving of instructions.

Schields v. Horbach, 40 Nebr., 103.

State v. Scott, 53 Nebr., 571, 572.

Amendment of bill of exceptions. Time to present for allowance. Notice.

Scott v. Flowers, 60 Nebr., 675.

Scott v. Flowers, 61 Nebr., 620.

State industrial school. Constitutionality of statute. Constitutional portion stands notwithstanding the defect.

Search v. Miller, 9 Nebr., 26.

In the trial of an action in replevin, the jury should be instructed as to which party has possession of the property at the time of the trial. If a verdict is silent as to the right of property and the right of possession, and as to the value thereof, according to the finding, no judgment can be rendered for any amount whatever.

Ulrich v. McConaughey, 63 Nebr., 10.

If the nature of a defendant's interest is not in issue and his right of possession is equal in value to the ownership, the silence of the verdict as to these questions is not prejudicial error.

State v. Green, 27 Nebr., 64.

State v. Boyd, 63 Nebr., 829.

Rosenbloom v. State, 64 Nebr., 342.

See Templeton v. City of Tekamah, *infra*.

State v. Sioux City & P. R. Co., 7 Nebr., 357.

Foree v. Stubbs, 41 Nebr., 271.

Latter case reaffirmed in Hall v. Hooper, 47 Nebr., 111, 118.

Right to maintain action to quiet title defined.

Strader v. White, 2 Nebr., 348.

Gibson v. Smith, 31 Nebr., 354.

Waggoner v. First Nat. Bank of Creighton, 43 Nebr., 84, 94, 95.

Liability for partnership debts.

Stutzner v. Printz, 43 Nebr., 306.

Herman v. Hayes, 58 Nebr., 54.

Discharge of attachment after judgment.

Templeton v. City of Tekamah, 32 Nebr., 542.

A provision of a municipal ordinance, which imposes a license-tax as a condition precedent to entering upon a certain occupation, and which punishes an offender against the provision with fine and imprisonment is unconstitutional and void.

State v. Boyd, 63 Nebr., 829.

Rosenbloom v. State, 64 Nebr., 342.

The provision of section 154 of the general revenue law authorizing fine and imprisonment as a means of enforcing a license-tax is constitutional and valid.

Thomas v. Markmann, 43 Nebr., 823.

Barker v. Wheeler, 60 Nebr., 470, 471.

Judgment of court having jurisdiction against an officer does not conclude his bondsmen, but is only prima-facie evidence.

Walker v. Turner, 27 Nebr., 103.

City of Omaha v. Richards, 49 Nebr., 244, 245

Specific exceptions to instructions.

Weaver v. Cressman, 21 Nebr., 675.

Anheuser-Busch Brewing Ass'n v. Hier, 52 Nebr., 424.

Funds in hands of clerk of district court not subject to garnishment. Action in equity.

Westcott v. Archer, 12 Nebr., 345.

Grebe v. Jones, 15 Nebr., 312, 317.

Latter case reaffirmed in Darnell v. Mack, 46 Nebr., 740.
Attachment. Levy. Jurisdiction.

White v. State, 28 Nebr., 341.

Coffield v. State, 44 Nebr., 417.

Filing information without preliminary hearing.

Whitman v. State, 42 Nebr., 841.

Metz v. State, 46 Nebr., 547, 556.

Burglary. Presumption. Possession of stolen property.

Wilson v. Macklin, 7 Nebr., 50.

Muller v. Plue, 45 Nebr., 701, 702.

Writ of replevin against officer holding goods under execution issued on void judgment.

Winslow v. State, 26 Nebr., 308, 312.

Leisenberg v. State, 60 Nebr., 628, 629.

Allegation of the particular hour of the night in an indictment for burglary.

Woodruff v. White, 25 Nebr., 745.

Stevens v. Carson, 30 Nebr., 544, 551.

Good faith of transaction between husband and wife.

PARTIALLY (NOT EXPRESSLY) OVERRULED.

Bohanan v. State, 18 Nebr., 57.

See note at the head of this digest of cases.

Chicago, B. & Q. R. Co. v. Cass County, 51 Nebr., 369.

James v. Higginbotham, 60 Nebr., 203.

Latter case reaffirmed in Gandy v. Cummins, 64 Nebr., 312, and Achenbach v. Pollock, 64 Nebr., 436.

Assignment in petition in error that court erred in overruling motion for new trial.

Coffield v. State, 44 Nebr., 417, 419.

See note at the head of this digest of cases.

Crowell v. Johnson, 2 Nebr., 146.

Wescott v. Archer, 12 Nebr., 345.

Attachment. Jurisdiction.

Eiseman v. Gallagher, 24 Nebr., 79.

Brewster v. Bank of Ainsworth, 43 Nebr., 79.

[Eiseman v. Gallagher approved in a dictum in Frenzer v. Richards, 60 Nebr., 131, 134.]

Usury. Defense. Affirmative relief. Rule of equity.

Forrester v. Kearney Nat. Bank, 49 Nebr., 655.

Franklin v. Kelley, 2 Nebr., 79.

See note at the head of this digest of cases.

Hallenbeck v. Hahn, 2 Nebr., 377.

Johnson v. Hahn, 4 Nebr., 139.

Enjoining the collection of taxes.

Hurley v. Estes, 6 Nebr., 386.

Hale v. Christy, 8 Nebr., 264.

Limitation of mortgage foreclosure.

Kane v. Union P. R. Co., 5 Nebr., 105.

Hurlburt v. Palmer, 39 Nebr., 158.

Anheuser-Busch Brewing Ass'n v. Peterson, 41 Nebr., 897.

Herbert v. Wortendyke, 49 Nebr., 182, 185.

Defective service. General appearance. Waiver of objection. Setting up want of personal jurisdiction in answer.

Kountze v. Scott, 49 Nebr., 258.

McCord v. Bowen, 51 Nebr., 247, 251.

Motion to dissolve attachment. Right of defendant who does not own property.

Kyger v. Ryley, 2 Nebr., 20.

Hale v. Christy, 8 Nebr., 264.

Limitation of mortgage foreclosure.

Mercer v. James, 6 Nebr., 406.

A verdict in replevin not in accord with statute in a case not involving the nature of defendant's interest, is error without prejudice.

Hooker v. Hammill, 7 Nebr., 231.

Verdict in replevin not in accord with statute in a case not involving the nature of defendant's interest, is prejudicial error.

Also

Hershiser v. Delone, 24 Nebr., 380.

Richardson Drug Co. v. Teasdall, 59 Nebr., 150.

Morehead v. Adams, 18 Nebr., 569.

Scott v. Overall, 50 Nebr., 144.

Construction of statute relative to settling bill of exceptions.

Morgan v. State, 51 Nebr., 672.

See note at the head of this digest of cases.

Morrissey v. Schindler, 18 Nebr., 672.

Herron v. Cole Bros., 25 Nebr., 692.

The discrepancy in the two preceding cases pointed out and the latter held to overrule the former in *Hanna v. Emerson*, 45 Nebr., 708, 709.

Right to bring action in county where one of the defendants resides.

Parks v. State, 20 Nebr., 515, 518.

See note at the head of this digest of cases.

Peters v. Dunnells, 5 Nebr., 460.

Hale v. Christy, 8 Nebr., 264.

Limitation of mortgage foreclosure.

OVERRULED ON A POINT NOT DISCUSSED IN FORMER OPINION.

Shiverick v. Gunning, 58 Nebr., 29.

Shiverick v. Gunning, 59 Nebr., 73.

Instructions as to matters not in evidence.

MODIFIED.

Ayres v. Wolcott, 62 Nebr., 805.

Ayres v. Wolcott, December 17, 1902.

Fraudulent conveyance.

Boyer v. Clark, 3 Nebr., 161.

Raymond Bros. v. Green, 12 Nebr., 215, 220.

Set-off. Unliquidated damages.

City of Seward v. Klenk, 27 Nebr., 615, 621.

Same case modified. See page 621 of same volume.

Retaining bill of exceptions.

Fremont, E. & M. V. R. Co. v. Whalen, 11 Nebr., 585.

Republican V. R. Co. v. Arnold, 13 Nebr., 485, 486.

Testimony of witness as to value of land.

Hiatt v. Brooks, 17 Nebr., 33.

City of Hastings v. Foxworthy, 45 Nebr., 676, 682.

Law of the case.

Jefferson County v. Saxon, 10 Nebr., 14.

On appeal to this court transcript must be filed within statutory six months, and *must* contain testimony.

Schuyler v. Hanna, 28 Nebr., 601.

On appeal transcript must be filed within statutory six months, but *need not* contain testimony.

John v. Connell, 61 Nebr., 267.

John v. Connell, 64 Nebr., 233.

Levy of sewer tax. Levy notice.

Mathews v. Toogood, 23 Nebr., 536.

Mathews v. Toogood, 25 Nebr., 99.

Interest-bearing coupons. Aggregate interest of principal debt and coupons must not exceed ten per cent.

Miller v. Waite, 59 Nebr., 319.

Miller v. Waite, 60 Nebr., 431.

Voluntary assignment. Partnership property.

People v. Hamilton County, 3 Nebr., 244.

Long v. State, 17 Nebr., 60.

Pleading in mandamus.

Pierce v. Atwood, 64 Nebr., 92.

Judgment modified July 10, 1902, without additional opinion, so it will not direct the dismissal as to Alice E. Atwood. See clerk's record No. 11,017.

Plummer v. Rohman, 61 Nebr., 61.

Plummer v. Rohman, 62 Nebr., 145.

Plea of estoppel.

Real v. Hollister, 17 Nebr., 661.

Real v. Hollister, 20 Nebr., 112.

Eviction before action on covenant.

Romberg v. Hughes, 18 Nebr., 579.

Schrandt v. Young, 62 Nebr., 254, 263.

Ulrich v. McConaughy, 63 Nebr., 10, 15.

Damages in replevin.

Royal Neighbors of America v. Wallace, 64 Nebr., 330.

Royal Neighbors of America v. Wallace, December 3, 1902.

Representations in an application for life insurance; their materiality matter of common knowledge.

Scott v. Flowers, 60 Nebr., 675.

Scott v. Flowers, 61 Nebr., 620.

State Industrial School.

Solt v. Anderson, 62 Nebr., 153.

An allegation of fact in a reply is taken as denied by the force of the Code.

Solt v. Anderson, 63 Nebr., 734.

Allegations of a reply are to be construed with the petition.

DISTINGUISHED.

Ackerman v. Thummel, 40 Nebr., 95.

Taylor v. Davey, 55 Nebr., 153.

Injunction. Remedy at law.

Ahlman v. Meyer, 19 Nebr., 63.

Reid v. Panska, 56 Nebr., 195, 196, 200.

Houck v. Linn, 56 Nebr., 743, 744.

Replevin. Quashing writ. Right to dismiss writ.

Allen v. Saunders, 6 Nebr., 436.

Merrill v. Willis, 51 Nebr., 162.

Landlord and tenant.

Allyn v. State, 21 Nebr., 593.

Browning v. State, 54 Nebr., 203, 205.

The former case holds that the fact that the defendant in a prosecution for a misdemeanor was not arraigned is not prejudicial error.

In the latter case, NORVAL, J., says: "Whether that decision [*Allyn v. State, supra*] is right or wrong we are not called upon to decide, since the scope of the opinion is limited to trials for misdemeanors." The learned judge then proceeds to lay down a different rule for a felony case.

Anderson v. Chicago, B. & Q. R. Co., 35 Nebr., 95.

Orgall v. Chicago, B. & Q. R. Co., 46 Nebr., 4, 8.

Death by wrongful act. Nominal damages. Pleading

Arnold v Badger Lumber Co., 36 Nebr., 841.

Patten v. Lane, 45 Nebr., 333.

Cross-bill. Jurisdiction.

Barnes v. State, 40 Nebr., 545.

Davis v. State, 54 Nebr., 177, 180.

Simple larceny. Larceny from bailee. Felonious taking. Instruction.

Bays v. State, 6 Nebr., 167.

Wallace v. School District, 50 Nebr., 171, 174, 175.

Power of school board to dismiss teacher.

Bazzo v. Wallace, 16 Nebr., 290.

Omaha Loan & Trust Co. v. Ayer, 38 Nebr., 891

Error after appeal.

Brewer v. Otoe County, 1 Nebr., 373.

May v. School District, 22 Nebr., 205.

Arapahoe Village v. Albee, 24 Nebr., 242.

The doctrine that lapse of time does not bar the sovereign, does not apply to municipal corporations whose powers are derived from the state; there is an exception by statute as to county warrants.

Bullock v. Pock. See Whipple v. Fowler, *infra*.

Burr v. Boyer, 2 Nebr., 265.

Eichoff v. Eikenbary, 52 Nebr., 332, 335.

Surety. Collateral security. Negligence of creditor. Release *pro tanto*.

Bush v. Tecumseh Nat. Bank, 64 Nebr., 451.

Stewart v. Rosengren, November 19, 1902.

Sufficient transcript. Affirmative error.

Calvert v. State, 34 Nebr., 616.

Chicago, B. & Q. R. Co. v. Steel, 47 Nebr., 741.

Street railway. Railroad. Right of way. Easement. Condemnation. Damages.

Chadron Banking Co. v. Mahoney, 43 Nebr., 214.

Philadelphia Mortgage & Trust Co. v. Goos, 47 Nebr., 804, 812.

Appointment of receiver. Pending appeal. Pending action.

City of Beatrice v. Leary, 45 Nebr., 149.

City of Omaha v. Bowman, 52 Nebr., 293, 296.

Diversion of water from a watercourse by a city.

City of Hastings v. Foxworthy, 45 Nebr., 676.

Dovey v. City of Plattsmouth, 52 Nebr., 642, 644, 645.

Municipal corporation. Damage to person or property.

City of Lincoln v. Finkle, 41 Nebr., 575.

Dovey v. City of Plattsmouth, 52 Nebr., 642, 644.

See City of Hastings v. Foxworthy, *supra*.

City of Lincoln v. Grant, 38 Nebr., 369.

Dovey v. City of Plattsmouth, 52 Nebr., 642, 644.

See City of Hastings v. Foxworthy, *supra*.

City of Omaha v. Richards, 49 Nebr., 244; 50 Nebr., 804.

City of Omaha v. Bowman, 52 Nebr., 293, 297.

Instruction. Overflow. Negligence.

City of Wahoo v. Dickinson, 23 Nebr., 426.

Sage v. City of Plattsmouth, 48 Nebr., 558, 561.

Municipal corporations. Extension of boundaries.

City of Wahoo v. Tharp, 45 Nebr., 563.

Sage v. City of Plattsmouth, 48 Nebr., 558, 561.

See City of Wahoo v. Dickinson, *supra*.

Cleveland Paper Co. v. Banks, 15 Nebr., 20.

Bullis v. Drake, 20 Nebr., 167.

Misconduct of prevailing party's counsel.

Coffman v. Brandhoeffler, 33 Nebr., 279.

Davis v. Ballard, 38 Nebr., 830.

Alias summons.

Courtney v. Parker, 16 Nebr., 311; 21 Nebr., 582.

Corey v. Plummer, 48 Nebr., 481, 484.

Judgment lien. Homestead.

Cram v. Cotrell. See Whipple v. Fowler, *infra*.

Curran v. Percival, 21 Nebr., 434.

Dolan v. McLaughlin, 48 Nebr., 842, 846, 847, 849.

Action on saloon-keeper's bond.

Dayton v. Lincoln, 39 Nebr., 74.

Violet v. Rose, 39 Nebr., 660.

Submission to the jury of issues admitted in pleadings, is prejudicial or non-prejudicial accordingly, as the jury may or may not have been *sidetracked* by the instruction.

Dern v. Kellogg, 54 Nebr., 650.

United States Nat. Bank of Omaha v. Westervelt, 55 Nebr., 424.

Right of collector to prefer his own creditor.

De Clerq v. Hager, 12 Nebr., 185.

State v. Keith County, 16 Nebr., 508.

The former of these cases holds that bridges upon the line of a highway within the county are not works of *internal improvement* according to the constitutional meaning. Opinion by LAKE, J. The latter case says the former ruling was a dictum, and holds that such bridges are works of internal improvement. MAXWELL, J.

Farmers & Merchants' Bank v. Anthony, 39 Nebr., 343.

Forrester v. Kearney Nat. Bank, 49 Nebr., 655.

Chattel mortgage. Registration. Attachment.

Frey v. Curtis, 52 Nebr., 406.

Holt v. Schneider, 57 Nebr., 523, 524, 531, 532.

Ostensible authority to act as an agent.

Garber v. Palmer, 47 Nebr., 699.

Reid v. Panska, 56 Nebr., 195, 196, 200.

See Ahlman v. Meyer, *supra*.

German Ins. Co. v. Heiduk, 30 Nebr., 288.

Eagle Fire Ins. Co. v. Globe Loan & Trust Co., 44 Nebr., 380.

Insurance. Company charged with knowledge of agent.

Goodwin v. Cunningham, 54 Nebr., 11.

Gillilan v. McDowall, December 12, 1902.

Foreclosure of tax lien. Redemption. Independent title.

Assignment of mortgage. Record. Foreclosure of prior lien. Bar.

Green v. Barker, 47 Nebr., 934.

Stenberg v. State, 50 Nebr., 127.

Conveyance of public land. Collateral attack.

Greene v. Greene, 42 Nebr., 634.

Buckingham v. Roar, 45 Nebr., 244.

Admission of incompetent testimony in equity trial.

Gregory v. Cameron, 7 Nebr., 414.

Morrison v. Boggs, 44 Nebr., 248.

Evidence in collateral actions.

Hale v. Sanborn, 16 Nebr., 1. See Livesey v. Omaha Hotel Co., *infra*.

Hards v. Platte Valley Improvement Co. See **Livesey v. Omaha Hotel Co.**, *infra*.

Haynes v. Aultman, 36 Nebr., 257.

Wood v. Roeder, 45 Nebr., 311.

Change of domicile. Service of summons.

Heidiman-Benoist Saddlery Co. v. Schott, 59 Nebr., 20.

Engel v. Dado, November 19, 1902.

Possession of chattels by defendant in replevin.

Higginbottom v. Benson, 24 Nebr., 461.

White v. Atlas Lumber Co., 49 Nebr., 82, 86.

Foreclosure of mortgage. Improvements by mortgagee. Rent.

Holt County v. Scott, 53 Nebr., 176.

Fire Ass'n v. Ruby, 58 Nebr., 730, 732.

Official bond. Non-approval. Estoppel.

Horn v. Queen, 5 Nebr., 472.

Einspahr v. Smith, 46 Nebr., 138.

Injunction. Final order. Appeal.

Jameson v. State, 25 Nebr., 185.

Bartell v. State, 40 Nebr., 232.

Reporter's notes as evidence in a prosecution for felony. The effect of these two cases is that a portion of the evidence can not be read to the jury from the reporter's notes, except by agreement and in presence of counsel.

Johnson v. Powers, 21 Nebr., 292.

Edee v. Strunk, 35 Nebr., 307.

Order appointing a receiver without notice; void or voidable?

Kiene v. Shoeffing, 33 Nebr., 21.

Kansas & W. N. R. Co. v. Conlee, 43 Nebr., 121.

Statute of frauds.

Livesey v. Omaha Hotel Co., 5 Nebr., 50.

Lincoln Shoe Mfg. Co. v. Sheldon, 44 Nebr., 279.

Suit against subscriber of stock to a corporation.

Lydick v. State, 61 Nebr., 309.

Close v. Swanson, 64 Nebr., 389.

Highway. Order of county board. Easement. Dedication. User.

McLaughlin v. Sandusky, 17 Nebr., 110.

Tukey v. City of Omaha, 54 Nebr., 370, 378.

Municipal corporation. Incurring debt. Taxpayer. Land-owner. Opening street.

Mathews v. Jones, 47 Nebr., 616.

Peterborough Savings Bank v. **Pierce**, 54 Nebr.
712, 718, 720, 722.

Assumption of mortgage.

Mead v. State, 25 Nebr., 444.

Davis v. State, 54 Nebr., 177, 180.

See **Barnes v. State**, *supra*.

Meehan v. First Nat. Bank, 44 Nebr., 213.

Maxwell v. Home Fire Ins. Co. of Omaha, 57
Nebr., 207, 210.

Foreclosure.

Metz v. State Bank, 7 Nebr., 165.

Hamilton v. Whitney, 19 Nebr., 303.

Judgment lien. Index. Notice.

Metz v. State, 46 Nebr., 547.

Davis v. State, 51 Nebr., 301, 303, 325.

Use of the expression "incriminating circumstances" in an in-
struction.

Metz v. State, 46 Nebr., 547.

Ferguson v. State, 52 Nebr., 432, 434, 436.

Instructions. Burglary.

Miller v. Meeker, 54 Nebr., 452.

Seiver v. Union P. R. Co., March 4, 1903.

Service on sham defendant for the purpose of bringing non-
resident defendant within jurisdiction of court.

Minneapolis Harvester Works v. Hedges, 11 Nebr., 46.

Moise v. Powell, 40 Nebr., 671.

Appeal. Personal jurisdiction. Privilege. Waiver.

Morrissey v. Chicago, B. & Q. R. Co., 38 Nebr., 406.

Fremont, E. & M. V. R. Co. v. Harlin, 50 Nebr.,
698, 713.

Railroad embankment. Negligence.

Morrissey v. Chicago, B. & Q. R. Co., 38 Nebr., 406.

Town v. Chicago, B. & Q. R. Co., 50 Nebr., 768,
774.

Surface water.

Myers v. McGavock, 39 Nebr., 843.

Bachelor v. Korb, 58 Nebr., 122.

Approval of a guardian's bond for the sale of the real estate
of his ward.

National Cordage Co. v. Sims, 44 Nebr., 148.

Yoder v. Haworth, 57 Nebr., 150, 153.

Contract of agency. Contract of sale.

National Masonic Accident Ass'n v. Burr, 44 Nebr., 856.

Johnston v. Phelps County Farmers' Mutual Ins. Co., 63 Nebr., 21.

Insurance. Waiver of forfeiture.

Distinguished in Farmers' Mutual Ins. Co. v. Kinney, 64 Nebr., 808.

Niland v. Kalish, 37 Nebr., 47. See Greene v. Greene, *supra*.

Olander v. Tighe, 43 Nebr., 344.

Corey v. Plummer, 48 Nebr., 481, 484.

See Courtney v. Parker, *supra*.

Osborne v. Plano Mfg. Co., 51 Nebr., 502.

Yoder v. Haworth, 57 Nebr., 150.

See National Cordage Co. v. Sims, *supra*.

Parmer v. Keith, 16 Nebr., 91.

Dreyfus v. Aul, 29 Nebr., 191.

Malicious attachment.

Payne v. Jones, 33 Nebr., 260.

Hansecom v. Lantry, 48 Nebr., 665, 666.

Bill of exceptions. Allowance. Continuing duty.

Porter v. Ourada, 51 Nebr., 510.

Holt v. Schneider, 57 Nebr., 523, 531, 532.

See Whipple v. Fowler, *infra*.

Pottinger v. Garrison, 3 Nebr., 221.

Farrar v. Triplett, 7 Nebr., 237.

Demurrer to answer. Pleading over. Waiver.

Potvin v. Meyers, 27 Nebr., 749.

Drexel v. Pusey, 57 Nebr., 30.

Principal and surety. Payment of judgment by surety and subsequent assignment.

Ragoss v. Cuming County, 36 Nebr., 375.

Bush v. Johnson County, 48 Nebr., 1, 2, 15.

Final order before board of county commissioners. Collateral attack.

Reed v. Reed,* 4 Nev., 396.

Walton v. Walton, 57 Nebr., 102.

Divorce on the ground of cruelty.

*This is the only foreign case in the list.—W. F. B.

Sexson v. Kelley, 3 Nebr., 104.

Thomas v. Hinkley, 19 Nebr., 324.

Liquor dealer's bond. Obligee. Condition. Liability.

Skinner v. Skinner, 38 Nebr., 756. See Greene v. Greene, *supra*.

Spaulding v. Johnson, 48 Nebr., 830.

Forrester v. Kearney Nat. Bank, 49 Nebr., 655.

Chattel mortgage. Registration. Attachment.

Spencer v. Thistle, 13 Nebr., 227.

Cockle Separator Mfg. Co. v. Clark, 23 Nebr., 702.

Vacating decree. Final order.

Springfield Fire & Marine Ins. Co. v. Winn, 27 Nebr., 649.

Home Ins. Co. v. Winn, 42 Nebr., 331.

Insurance. Fraud. Perjury.

State v. Burlington & M. R. R. Co., 60 Nebr., 741.

State v. Eskew, 64 Nebr., 600, 601, 602.

Constitutional law, section 26, article 5, state officers.

State v. Cochran, 28 Nebr., 798. See Gregory v. Cameron, *supra*.

State v. Dimond, 44 Nebr., 154.

Sage v. City of Plattsmouth, 48 Nebr., 558, 561.

Municipal corporation. Quo warranto. Injunction. Extension of boundaries. Collection of taxes.

State v. Fremont, E. & M. V. R. Co., 60 Nebr., 749.

State v. Eskew, 64 Nebr., 600, 601, 602.

Constitutional law, section 26, article 5.

State v. Graham, 21 Nebr., 329.

State v. Clark, 39 Nebr., 899.

School land. Contract of purchase. Default in payment of interest.

State v. Hill, 38 Nebr., 698.

State v. Hill, 47 Nebr., 456, 460, 480, 509, 526.

Liability of treasurers. Certificate of deposit.

State v. Poynter, 59 Nebr., 417.

State v. Eskew, 64 Nebr., 600, 601, 602.

Constitutional law, section 26, article 5, state officers.

State v. Robinson, 20 Nebr., 96.

In re Groff, 21 Nebr., 647.

Constitution. Statute.

State v. Uridil, 37 Nebr., 371.

City of Wahoo v. Dickinson, 23 Nebr., 426.

Village of Hartington v. Luge, 33 Nebr., 623.

City of Wahoo v. Tharp, 45 Nebr., 563.

The distinction between these cases is drawn in Sage v. City of Plattsmouth, 48 Nebr., 558, at page 561.

Proceedings in nature of quo warranto to test the legality of an incorporation.

Stewart v. Carter, 4 Nebr., 564.

Arnold v. Baker, 6 Nebr., 134.

An appeal lies from the district to the supreme court from an order sustaining a demurrer to a petition in equity, but not where the demurrer is for misjoinder of causes of action.

Stewart v. Rosengren, November 19, 1902.

Seiver v. Union P. R. Co., March 4, 1903.

See Miller v. Meeker, *supra*.

Stump v. Richardson County Bank, 24 Nebr., 522.

Chapman v. Garber, 46 Neb., 16, 20.

Negotiable instrument. Surety. Payment. Contribution.

Tootle v. First Nat. Bank of Chadron, 34 Nebr., 863.

State Bank of Lushton v. Kelley, 49 Nebr., 242.

Chattel mortgage. Prior equities. Constructive notice.

Treat v. Price, 47 Nebr., 875.

Beckman v. Birchard, 48 Nebr., 805.

Accord and satisfaction. Acceptance. Estoppel.

Village of Hartington v. Luge, 33 Nebr., 623.

State v. Dimond, 44 Nebr., 154.

See State v. Uridil, *supra*.

Western Union Telegraph Co. v. Fremont, 39 Nebr., 692.

Western Union Telegraph Co. v. Village of Wakefield, June 3, 1903.

Occupation tax on telegraph company.

West v. Van Pelt, 34 Nebr., 63.

Mayer v. Ver Bryck, 46 Nebr., 221.

Special contract. Recovery. Quantum meruit.

Whipple v. Fowler 41 Nebr., 675.

Snell v. Margritz, 64 Nebr., 613.

Payment of mortgage.

White v. Blum, 4 Nebr., 555.

Pickering v. Hastings, 56 Nebr., 201.

Liability of stockholders.

Wilson v. City of Auburn, 27 Nebr., 435.

Ives v. Irey, 51 Nebr., 136, 141, 142.

Taxes. Special assessments.

Yeazel v. White, 40 Nebr., 432.

Philadelphia Mortgage & Trust Co. v. Goos,
47 Nebr., 804, 811.

See Chadron Banking Co. v. Mahoney, *supra*.

Young v. Cooper, 12 Nebr., 610.

Geneva Nat. Bank v. Bailor, 48 Nebr., 866, 869.

Attachment. False representation of a material fact.

OVERRULED IN TOTO.

Allis v. Newman, 29 Nebr., 207.

Stull v. Cass County, 51 Nebr., 760.

Bill of exceptions. Mistake. Loss. Failure to file in time.

Anselme v. American Savings & Loan Ass'n, 63 Nebr., 525.

Anselme v. American Savings & Loan Ass'n, De-
cember 17, 1902.

Building and loan associations. Usury.

Arlington State Bank v. Paulsen, 57 Nebr., 717.

Arlington State Bank v. Paulsen, 59 Nebr., 94.

Review of questions not litigated below.

Banghart v. Lamb, 34 Nebr., 535.

Selby v. McQuillan, 45 Nebr., 512.

Judgment against sureties on appeal bond.

Barker v. Wheeler, 60 Nebr., 470.

Barker v. Wheeler, 62 Nebr., 150.

General denial. Proof of payment.

Bartlett v. Bartlett, 13 Nebr., 456.

Bartlett v. Bartlett, 15 Nebr., 593.

Husband and wife. Equitable title to real property.

Bellinger v. White, 5 Nebr., 399.

Graff v. Ackerman, 38 Nebr., 720.

See Edgington v. Cook, *infra*.

Bennet v. Fooks, 1 Nebr., 465.

Galway v. Malchow, 7 Nebr., 285.

Mansfield v. Gregory, 8 Nebr., 432.

Harral v. Gray, 10 Nebr., 186.

Mansfield v. Gregory, 11 Nebr., 297.

Hubbart v. Walker, 19 Nebr., 94.

Galway v. Malchow reaffirmed in Sheasley v. Keens, 48 Nebr., 57, 59.

Purchaser at sheriff's sale. Prior lien.

Bonns v. Carter, 20 Nebr., 566, 22 Nebr., 495.

Jones v. Loree, 37 Nebr., 816.

Kilpatrick-Koch Dry Goods Co. v. Bremers, 44 Nebr., 863, 866.

Last two cases reaffirmed in Grand Island Banking Co. v. Costello, 45 Nebr., 119, 140, and Goldsmith v. Erickson, 48 Nebr., 48.

No presumption of fraud because the property transferred was all the vendor owned.

Bressler v. Wayne County, 25 Nebr., 468.

Wayne County v. Bressler, 32 Nebr., 818.

Taxation of national bank stock. Deduction of debts.

Burlington & M. R. R. Co. v. Shoemaker, 18 Nebr., 369.

Chicago, B. & Q. R. Co. v. Cox, 51 Nebr., 479.

Railroad company's liability for damages where line is not fenced.

Cass County v. Chicago, B. & Q. R. Co., 25 Nebr., 348.

Chicago, B. & Q. R. Co. v. Richardson County, 61 Nebr., 519.

Railroad bridge across navigable river assessable by state board.

Cedar County v. Jenal, 14 Nebr., 254.

State v. Hill, 47 Nebr., 456.

Bush v. Johnson County, 48 Nebr., 1.

In re State Treasurer's Settlement, 51 Nebr., 116.

Bartley v. State, 53 Nebr., 310, 337.

But see dictum in Thomssen v. Hall County, 63 Nebr., 777, 783.

Payment by county treasurer to his successor without manual delivery of legal tender, viz., with deposits in a bank.

City of Seward v. Klenk, 27 Nebr., 615. See Scott v. Waldeck, *infra*.

Coy v. Jones, 30 Nebr., 798.

Globe Publishing Co. v. State Bank of Nebraska, 41 Nebr., 175, 176.

Deere v. Losey, 48 Nebr., 622.

Sager v. Summers, 49 Nebr., 459.

Voluntary assignment.

Edgington v. Cook, 32 Nebr., 551.

Graff v. Ackerman, 38 Nebr., 720.

Taxation of land purchased from the government before issuance of patent.

First Nat. Bank of Hastings v. McAllister, 33 Nebr., 646.

Capital Nat. Bank of Lincoln v. American Exchange Nat. Bank of Chicago, 51 Nebr., 707.

Negotiable paper. Legal holiday. Presentment and protest. Common law not abrogated by statute.

First Nat. Bank of South Bend v. Gandy, 11 Nebr., 431, 433.

McIntosh v. Johnson, 51 Nebr., 33, 34.

Public funds. Garnishment.

Fisher, Ex parte, 6 Nebr., 309.

This court will not inquire into the constitutionality of the law under which the defendant was committed, in a habeas-corpus proceeding.

Sovereign v. State, 7 Nebr., 409.

Ex parte Thomason, 16 Nebr., 238.

The court *did* inquire into the constitutionality of the law under which the defendant was committed in a proceeding in habeas corpus.

Strange and unaccountable as it may seem, there is no allusion to the *Fisher Case* in either *Sovereign v. State* or *Ex parte Thomason*.

Godman v. Converse, 38 Nebr., 657.

Godman v. Converse, 43 Nebr., 463.

Administration of estates. Allowance to widow. Acceptance of conditional will.

Horn v. Miller, 20 Nebr., 98.

Bickel v. Dutcher, 35 Nebr., 761.

Latter case reaffirmed in Continental Building & Loan Ass'n v. Mills, 44 Nebr., 136, 142.

Taking appeal. Limitation of time.

Howell v. Roberts, 29 Nebr., 483.

Globe Publishing Co. v. State Bank of Nebr., 41 Nebr., 175, 176.

Liability of stockholder in corporation.

Landauer v. Mack, 39 Nebr., 8.

Landauer v. Mack, 43 Nebr., 430.

Attachment. Levy on mortgaged chattels. Burden of proof.

McDonald v. Bowman, 35 Nebr., 93.

McDonald v. Bowman, 40 Nebr., 269.

Chattel mortgage. Attachment. Replevin by mortgagee.

Mathis v. Pitman, 32 Nebr., 191.

Wallace v. Sheldon, 56 Nebr., 55, 59.

Taxing of costs and attorneys' fees against the estate, in a will contest.

Merrill v. Wright, 41 Nebr., 351.

Neither a levy nor assessment of taxes, will be presumed from the mere introduction in evidence of a treasurer's tax receipt or certificate of sale.

Darr v. Wisner, 63 Nebr., 305.

In the foreclosure of a tax lien, the certificate of sale is evidence, *prima facie*.

Morgan v. State, 48 Nebr., 798.

State v. Cornell, 50 Nebr., 526.

Compensation of stenographer.

Nebraska Telephone Co. v. Cornell, 58 Nebr., 823.

Pacific Express Co. v. Cornell, 59 Nebr., 364.

Construction of petition in injunction.

Nebraska Telephone Co. v. Jones, 59 Nebr., 510.

Nebraska Telephone Co. v. Jones, 60 Nebr., 396.

Contributory negligence. Directing verdict.

Nickolls v. Barnes, 32 Nebr., 195.

Nickolls v. Barnes, 39 Nebr., 103.

Landlord and tenant. Possession by tenant under written lease unilaterally executed, tantamount to occupying under oral lease.

Omaha & R. V. R. Co. v. Clark, 35 Nebr., 867.

Omaha & R. V. R. Co. v. Clarke, 39 Nebr., 65.

Question of fact.

Phillips v. Bishop, 31 Nebr., 853.

Phillips v. Bishop, 35 Nebr., 487.

The latter case overruled the former, on a question of fact and not of law.

Pickens v. Plattsmouth Land Co., 31 Nebr., 585.

Pickens v. Plattsmouth Investment Co., 37 Nebr., 272.

Mechanic's lien. Question of fact.

Rice v. Gibbs, 33 Nebr., 460.

Rice v. Gibbs, 40 Nebr., 264, 265.

Assignability of a contract of option for a sale of real estate.

Rittenhouse v. Bigelow, 38 Nebr., 543.

Rittenhouse v. Bigelow, 38 Nebr., 547.

Cities of the first class. Equalization of taxes by township.

St. Joseph & D. R. Co. v. Baldwin, 7 Nebr., 247.

Railroad Co. v. Baldwin, 103 U. S., 426.

Government grant of land to railroad company.

The latter case overruled the former on a question of fact and not of law.

Sandwich Mfg. Co. v. Feary, 34 Nebr., 411.

Sandwich Mfg. Co. v. Feary, 40 Nebr., 226.

Harvesting machine. Sale. Contract. Warranty.

Scott v. Overall, 50 Nebr., 144.

Williams v. Miles, 62 Nebr., 566.

Construction of statute relative to settling bill of exceptions.
The latter case reaffirms Morehead v. Adams.*

Scott v. Waldeck, 11 Nebr., 525.

Jones v. Wolfe, 42 Nebr., 272.

City Nat. Bank of Hastings v. Thomas, 46 Nebr., 861.

State v. Ambrose, 47 Nebr., 235, 241.

Use of quashed bill of exceptions.

Shawang v. Love, 15 Nebr., 142.

Hurlburt v. Palmer, 39 Nebr., 158, 159.

Latter case reaffirmed in Mayer v. Nelson, 54 Nebr., 434.

Waiver of defects in process by appeal or error.

Shellenberger v. Ransom, 31 Nebr., 61.

Shellenberger v. Ransom, 41 Nebr., 631.

Descent in case of murder of ancestor by heir.

Shellenberger v. Ransom, 41 Nebr., 631.

Veeder v. McKinley-Lanning Loan Co., 61 Nebr., 892, 912.

Descent of real estate.

Smith v. Boyer, 29 Nebr., 76.

Smith v. Boyer, 35 Nebr., 46.

The latter case overruled the former by the established rule that where evidence is fairly conflicting the finding or verdict of the nisi-pris court will not be disturbed, the court applying this rule to an order discharging an attachment.

Sonnenschein v. Bartels, 37 Nebr., 592.

Sonnenschein v. Bartels, 41 Nebr., 703.

Fraudulent conveyance.

*Morehead v. Adams, 18 Nebr., 569, will be found in the list of cases partially (not expressly) overruled.—W. F. B.

Stanwood v. City of Omaha, 38 Nebr., 552.

Stanwood v. City of Omaha, 42 Nebr., 303.

Rule as to conflicting evidence applied.

State v. Keim, 8 Nebr., 63.

Farmers & Merchants' Banking Co. v. City of
Red Cloud, 62 Nebr., 442.

Garnisheeing public money.

State v. Missouri P. R. Co., 29 Nebr., 550.

Missouri P. R. Co. v. Nebraska, 164 U. S., 403,
17 Sup. Ct. Rep., 130, 41 L. Ed., 489.

Latter case reaffirmed in Chicago, B. & Q. R. Co. v. State, 50
Nebr., 399.

Grain elevator case. The taking by a state of the private prop-
erty of a person or a corporation without the owner's consent for
the use of another.

State v. Roper, 46 Nebr., 724.

State v. Roper, 47 Nebr., 417.

Relocation of county seat.

State v. Seavey, 22 Nebr., 454.

State v. Moores, 55 Nebr., 480.

Municipal corporation. Local self-government.

Stewart-Chute Lumber Co. v. Missouri P. R. Co., 28 Nebr., 39.

Stewart-Chute Lumber Co. v. Missouri P. R. Co.,
33 Nebr., 29.

Railroad. Mechanic's lien. Material-man.

Svanson v. City of Omaha, 38 Nebr., 550.

Svanson v. City of Omaha, 42 Nebr., 303.

Sufficiency of evidence.

Thomas v. Edgerton, 36 Nebr., 254.

Thomas v. Edgerton, 40 Nebr., 25, 26.

Liability of officer for sufficiency of sureties on replevin bond.

United States Nat. Bank of Omaha v. Geer, 53 Nebr., 67.

United States Nat. Bank of Omaha v. Geer, 55
Nebr., 462.

Commercial paper. Restrictive indorsement.

TO BE COMPARED.

Atchison & N. R. Co. v. Baty, 6 Nebr., 37.

Graham v. Kibble, 9 Nebr., 182.

Clearwater Bank v. Kurkonski, 45 Nebr., 1.

Hier v. Hutchings, 58 Nebr., 334.

Everson v. State, October 22, 1902.

The first case held a part of a statute which gave double value in damages for the accidental destruction of live stock on a railroad track void.

The second case held the fifty-dollar penalty for illegal fees constitutional.

The third case held the statutory penalty of \$50, for failing to enter satisfaction of chattel mortgage, was not in conflict with the constitution, citing the second case.

The fourth case held the five-hundred-dollar penalty for recommitment after a release by a writ of habeas corpus could be recovered, citing the third case. The constitutionality of the statute was assumed.

The fifth holds the statutory fine—in double the amount of the thing—for the use of the injured party in a prosecution for embezzlement is not in conflict with the constitution, citing with approval the second, third and fourth cases.

The first of these cases has been made the basis for the doctrine that punitive damages are not recoverable in this state. *Boldt v. Budwig*, 19 Nebr., 739; *Rosewater v. Hoffman*, 24 Nebr., 222, and other cases too numerous for citation. But is this construction warrantable in view of the language of the opinion, 6 Nebr., p. 45?

Becker v. Anderson, 11 Nebr., 493, 496.

Marsh v. Burley, 13 Nebr., 261, 264.

Housel v. Cremer, 13 Nebr., 298.

Lancaster County Bank v. Gillilan, 49 Nebr., 165, 180.

In the first of the foregoing cases, it was stated—dictum—that the filing and recording of a chattel mortgage was equivalent to a change of possession of the property. In the second case, the writer of the former opinion retracts the statement. In the first case, it was held that, where a chattel mortgage was void as to creditors, the mortgaged property was assets in the hands of the executor of the mortgagor. The third and fourth cases appear to be in almost direct conflict with this doctrine, and in the fourth case the opinion in the first, as to this point, is analytically criticised.

Berkley v. Lamb, 8 Nebr., 392.

Schribar v. Platt, 19 Nebr., 625.

Best v. Zutavern, 53 Nebr., 619.

Execution. Homestead. Confirmation of sale.

The last decision says that the second overruled the first.

Bradshaw v. City of Omaha, 1 Nebr., 16.

Turner v. Althaus, 6 Nebr., 54, 77.

Taxation of vacant and farm lands within city limits.

Bryant v. Estabrook, 16 Nebr., 217.

Schoenheit v. Nelson, 16 Nebr., 235, 238.

Holmes v. Andrews, 16 Nebr., 296.

Otoe County v. Brown, 16 Nebr., 394, 397.

McClure v. Warner, 16 Nebr., 447.

D'Gette v. Sheldon, 27 Nebr., 829.

Alexander v. Wilcox, 30 Nebr., 793.

Warren v. Demary, 33 Nebr., 327.

Fuller v. Colfax County, 33 Nebr., 716.

Black v. Leonard, 33 Nebr., 745.

Alexander v. Thacker, 43 Nebr., 494, 497.

Foreclosure of tax lien. When does the five-year limit begin to run?

In the opinion in the last case cited NORVAL, C. J., makes an exhaustive review of the decisions on this point.

Commercial Nat. Bank v. Nebraska State Bank, 33 Nebr., 292.

Lancaster County Bank v. Gillilan, 49 Nebr., 165, 178.

Assignment for benefit of creditors. Title of assignee.

The opinion in the latter case, by IRVINE, C., contains an exhaustive summary. The decisions which he cites are cited elsewhere in this table.

Dawson v. Merrille, 2 Nebr., 119.

Simmons v. Yurann, 11 Nebr., 516.

Carkins v. Anderson, 21 Nebr., 364, 368.

Carkins v. Anderson, 135 U. S., 483.

Public lands. Improvements.

Entry of land under United States laws. Agreement by entryman to convey after he shall have acquired title. Public policy.

The third case in the foregoing series states that the second overrules the first. But the fourth case in such series reverses the third.

Filley v. Duncan, 1 Nebr., 134.

Colt v. Du Bois, 7 Nebr., 391, 394.

In the opinion in the former case CROUNSE, J., says that the lien of a judgment does not attach to lands acquired after its rendition, so as to affect bona-fide purchasers, until levy of execution. In the latter opinion, GANTT, C. J., says that question was not before the court in the former case, and then proceeds to lay down the opposite rule.

German Nat. Bank v. First Nat. Bank, 55 Nebr., 86.

An insolvent corporation, merely because it is a corporation, is not prohibited from preferring particular creditors.

National Wall Paper Co. v. Columbia Nat. Bank, 63 Nebr., 234.

An insolvent corporation can not make a preference of a debt due from it on which the officers and directors are bound as sureties.

Grimes v. Farrington, 19 Nebr., 44.

Bonns v. Carter, 20 Nebr., 566.

Hershiser v. Higman, 31 Nebr., 531.

Hamilton v. Isaacs, 34 Nebr., 709, 713, 714, 716.

Jones v. Loree, 37 Nebr., 816.

Kilpatrick-Koch Dry Goods Co. v. Bremers, 44 Nebr., 863.

Assignment for the benefit of creditors.

The sixth opinion in the foregoing series contains a learned discussion by IRVINE, C.

Hagenbuck v. Reed, 3 Nebr., 17.

Washington County v. Fletcher, 12 Nebr., 356, 359.

Graff v. Ackerman, 38 Nebr., 720, 724.

Taxation of school lands where the state has not parted with the title.

Handy v. Brong, 4 Nebr., 60, 64.

Buckmaster v. McElroy, 20 Nebr., 557, 564.

In the former opinion GANTT, J., appears to lay down the rule that statutes in derogation of the common law are to be strictly construed. In the latter, COBB, J., lays down the opposite rule. The first section of the Code of Civil Procedure would appear to settle the question as to that Code.

Harmon v. City of Omaha, 53 Nebr., 164, 170.

Language seems to imply that laches may bar a proceeding by injunction to prevent the collection of a void tax.

Casey v. Burt County, 59 Nebr., 624.

Mere delay of party in proceeding against a void tax, will not constitute laches.

Hill v. Palmer, 32 Nebr., 632.

Reynolds v. Fisher, 43 Nebr., 172, 173.

Farmers' Loan & Trust Co. v. Memminger, 48 Nebr., 17.

Lien upon personal property for taxes.

Hoover v. Engles, 63 Nebr., 688.

Personal taxes can be collected in an action for debt.

Rosenbloom v. State, 64 Nebr., 342.

A tax is not a debt as the word is used in the constitution, and, consequently, the provision of section 154 of the general revenue law authorizing fine and imprisonment as a means of enforcing a license-tax does not trench upon the constitution.

Howell v. Hathaway, 28 Nebr., 807.

Rust-Owen Lumber Co. v. Holt, 60 Nebr., 80.

Mechanic's lien for material furnished to husband for improvements upon wife's property with her knowledge.

Insurance Co. of North America v. Bachler, 44 Nebr., 549.

Hartford Fire Ins. Co. v. Corey, 53 Nebr., 209,
213, following German Ins. Co. v. Eddy, 37
Nebr., 461.

Lancashire Ins. Co. v. Bush, 60 Nebr., 116.

Farmers & Merchants' Ins. Co. v. Dobney, 62
Nebr., 213, 23 Sup. Ct. Rep., 565.

From the latter decision Harlan, Brewer and Brown, JJ., dis-
sented.

Recovery of attorney fees in action on insurance policy.

Johnson v. Jones, 2 Nebr., 126.

Holliday v. Brown, 33 Nebr., 657, 34 Nebr., 232.

Wilson v. Shipman, 34 Nebr., 573.

Campbell Printing Press & Mfg. Co. v. Marder,
50 Nebr., 283, 287.

Impeachment of officer's return.

Lander v. Abrahamson, 34 Nebr., 553.

Anthony v. Korbach, 64 Nebr., 509, 513.

In the latter case, ALBERT, C., uses the following language in
regard to the verification of a petition to vacate a judgment:
"We have not overlooked *Lander v. Abrahamson*, 34 Nebr., 553,
where, in the body of the opinion, it is held that the petition in
an action of this kind, must be verified positively. No good rea-
son is given for the rule announced, nor was the point directly
involved in the case. It is entirely omitted from the syllabus.
In our opinion, it does not state the correct rule of practice and
should not be followed."

McCord v. Krause, 36 Nebr., 764.

Kilpatrick-Koch Dry Goods Co. v. Bremers, 44
Nebr., 863.

Attachment. Chattel mortgage.

Merriam v. Goodlett, 36 Nebr., 384.

Brown v. Ulrich, 48 Nebr., 409, 413.

Specific performance. Default in payment. Essence of con-
tract. Waiver.

The writer of the opinion in the latter case says that the point
in question was not necessary to a decision of the former; yet he
makes a conditional overruling *in hæc verba*.

Merriam v. Rauen, 23 Nebr., 217.

Alexander v. Thacker, 43 Nebr., 494.

Interest on tax-sale certificate.

Minneapolis Harvester Works v. Hedges, 11 Nebr., 46, 48.

O'Leary v. Iskey, 12 Nebr., 136, 137.

Creighton v. Keith, 50 Nebr., 810, 814.

Jenkins v. State, 60 Nebr., 205.

Effect of appeal as to vacating judgment.

Moore v. Kepner, 7 Nebr., 291.

General Statutes, 1873, p. 257.

Selby v. McQuillan, 45 Nebr., 512, 513, 514.

Appeal bond. Judgment against sureties.

Morgan v. State.

State v. McBride.

Goble v. Simeral.

See note at head of this digest of cases.

Morse v. Engle, 28 Nebr., 534.

Holliday v. Brown, 34 Nebr., 232, 234.

Radzuweit v. Watkins, 53 Nebr., 412, 416.

Service of summons in the alternative manner.

Morse v. Steinrod, 29 Nebr., 108.

Brown v. Work, 30 Nebr., 800.

Thompson v. Richardson Drug Co., 33 Nebr., 714.

Lininger v. Raymond, 12 Nebr., 19.

Nelson v. Garey, 15 Nebr., 531.

Bierbower v. Polk, 17 Nebr., 268.

Grimes v. Farrington, 19 Nebr., 44, 48.

Costello v. Chamberlain, 36 Nebr., 45.

Kavanaugh v. Oberfelder, 37 Nebr., 647.

Farwell v. Wright, 38 Nebr., 445.

Sherwin v. Gaghagen, 39 Nebr., 238.

Hewitt v. Commercial Banking Co., 40 Nebr., 820.

Preferring a creditor. Fraudulent conveyance.

Niland v. Kalish, 37 Nebr., 47.

Lihs v. Lihs, 44 Nebr., 143.

These two cases are not inconsistent, as a careful reading will disclose.

Husband and wife. Testimony.

Parrish v. State, 18 Nebr., 45.

Horton v. State, 63 Nebr., 34.

The former case was reopened two years after affirmance. In the latter case the supreme court held that its jurisdiction closed with the term at which the judgment of affirmance was pronounced.

Patrick v. Leach, 8 Nebr., 530, 538.

Search v. Miller, 9 Nebr., 26, 27, 30.

Kopplekom v. Huffman, 12 Nebr., 95.

Altschuler v. Algaza, 16 Nebr., 631.

Dunbar v. Briggs, 18 Nebr., 94, 97.

Stevens v. Carson, 30 Nebr., 544, 550.

Wylie v. Charlton, 43 Nebr., 840.

Veeder v. McKinley-Lanning Loan & Trust Co.,
61 Nebr., 892.

Doane v. Dunham, 64 Nebr., 135.

Preponderance of evidence.

In *Search v. Miller* MAXWELL, J., says: "The court also erred

in instructing the jury that a 'clear preponderance of the evidence was required to impeach the consideration.' In a civil action a preponderance of evidence is all that is required to sustain the claim of a party to the action."

In *Doane v. Dunham* POUND, C., says: "Parol evidence to establish a resulting trust, must be clear, unequivocal and convincing."

Pearson v. Kansas Mfg. Co., 14 Nebr., 211.

Barry v. Wachosky, 57 Nebr., 534, 537.

The former decision held in effect that where an action was commenced in one county against several defendants, and summons was issued to another bailiwick, the court retained its jurisdiction notwithstanding it developed that the defendant, whose presence gave the court jurisdiction, was improperly joined. The writer of the latter opinion says that the former opinion "is no longer regarded as sound, but has in effect long been overruled."

Peckinbaugh v. Quillin, 12 Nebr., 586.

Burnham v. Doolittle, 14 Nebr., 214, 216.

Attachment. Garnishment. Equity of redemption.

Ray v. Mason, 6 Nebr., 101.

Credit Foncier v. Rogers, 8 Nebr., 34.

Aultman v. Howe, 10 Nebr., 8.

Oliver v. Sheeley, 11 Nebr., 521.

Walker v. Lutz, 14 Nebr., 274.

Sides v. Brendlinger, 14 Nebr., 491.

Kyle v. Chase, 14 Nebr., 528.

Republican V. R. Co. v. Boyse, 14 Nebr., 130, 132.

Donavan v. Sherwin, 16 Nebr., 129, 130.

Tessier v. Crowley, 16 Nebr., 369, 372.

Preserving affidavits in bill of exceptions. The last case repudiates what it claims was a dictum in the eighth opinion of this series.

Searles v. Auerhoff, 28 Nebr., 668.

Nothing appearing to the contrary, it will be presumed that judicial proceedings are conducted with reference to sun time.

Iowa Loan & Trust Co. v. Estate of Devall, 63 Nebr., 826, 827.

"That decision [*Searles v. Auerhoff*] was rendered in 1890, before standard time was generally adopted in this state, and may, therefore, be said to have had as its basis the experienced course of human conduct. Since then, however, the former method of measuring time has fallen into disuse to such an extent that the reason for the presumption has almost, if not entirely, ceased to exist."

Scott v. Waldeck, 11 Nebr., 525.

Donovan v. Sherwin, 16 Nebr., 129, 130.

City of Seward v. Klenk, 27 Nebr., 615, 30 Nebr., 775.

Jones v. Wolfe, 42 Nebr., 272.

City Nat. Bank of Hastings v. Thomas, 46 Nebr., 861, 863.

Use of bill of exceptions after the same has been quashed.

Seymour v. Street, 5 Nebr., 85. See White v. Blum, *infra*.

Shelley v. Towle. See Haller v. Blaco, *infra*.

State v. Moore, 37 Nebr., 13.

Weis v. Ashley, 59 Nebr., 494.

The governor as part of the law-making power.

State v. Priebnow, 16 Nebr., 131.

Arnold v. State, 38 Nebr., 752.

An obiter-dictum in the first opinion disapproved in the second.
Plea in bar. Jury trial.

State v. Sanford, 12 Nebr., 425.

State v. Krumpus, 13 Nebr., 321.

Mann v. Welton, 21 Nebr., 541.

Hamilton v. Fleming, 26 Nebr., 240.

State v. Wilson, 31 Nebr., 462, 464.

Johnson v. Bartek, 56 Nebr., 422, 424.

Attachment. Exempt property.

The doctrine in Nebraska now is that the judgment of a court sustaining an attachment does not settle the status of the property attached as to its exemption.

Walker v. Morse, 33 Nebr., 650.

Moline v. Curtis, 38 Nebr., 520, 528.

Motion to quash bill of exceptions.

Wescott v. Archer, 12 Nebr., 345.

Grebe v. Jones, 15 Nebr., 312, 317.

The opinion in each of these cases was written by MAXWELL, J. The latter opinion, at the most, hardly more than modifies the former. In the latter case there is a vigorous dissenting opinion by LAKE, C. J.

White v. Blum, 4 Nebr., 555, 558.

Miller v. Hyers, 11 Nebr., 474.

Stay. Waiver of error proceeding.

Wilson v. Griess, May 21, 1903.

Gilbert v. Garber, June 18, 1903.

The acknowledgment of a mortgage incumbering a family homestead by an officer interested in sustaining the conveyance. See *Havemeyer v. Dahn*, 48 Nebr., 536, and *Horbach v. Tyrrell*, 48 Nebr., 514.

Woods v. Shields, 1 Nebr., 453, 454.

Kyger v. Ryley, 2 Nebr., 20, 27.

Strict foreclosure. Effect of statute

Wright v. People, 4 Nebr., 407.

The first sentence of the third paragraph of the syllabus lays down the doctrine of moral insanity *sine cere*. The latter sentence of the same paragraph lays down the right-and-wrong rule. These two sentences seem to be in direct and irreconcilable conflict. It appears, from an examination of the original opinion on file, that the syllabus was *not* prepared by the court.

NEGATIVED BY CONSTITUTION OF 1875.

Burlington & M. R. R. Co. v. Lancaster County, 4 Nebr., 293.

Land road tax valid under constitution of 1867.

McCann v. Merriam, 11 Nebr., 241.

Land road tax invalid under constitution of 1875.

City of Tecumseh v. Phillips, 5 Nebr., 305.

License money collected by towns and villages belongs to county.

City of Hastings v. Thorne, 8 Nebr., 160.

License money collected by a city or village belongs to such municipality.

Jones v. Nebraska City, 1 Nebr., 176.

A special act of the legislature, approved February 12, 1866, being "An Act to authorize the Town Council of Nebraska City to raise money to erect a Central or High School Building," Revised Statutes of 1866, page 692. Clause 4, section 14, of such act gives the board of education power "to contract with and employ all the teachers in the several schools therein, and at their pleasure to remove them," page 695. In *Jones v. Nebraska City*, *supra*, the court held the statute to be a part of the contract, and that the court had no power to inquire into the cause of removal. This law was repealed by section 15, article III. of the Constitution of 1875. *Wallace v. School District*, 50 Nebr., 171, 174.

NEGATIVED BY STATUTE.

Armstrong v. Mayer, 60 Nebr., 423.

Chapter 82, Laws of 1883, which attempted to amend section 1030 of the Code by grafting into the original section the right of appeal, is inimical to section 11, article 3, of the Constitution.

House Roll No. 8, introduced by Loomis, of Dodge (Session Laws 1901, p. 484, ch. 85), provided for an appeal in forcible entry and detainer. Code of Civil Procedure, ch. 10, sec. 1032a.

Aultman, Miller & Co. v. Mallory, 5 Nebr., 178.

A sale and delivery of goods on condition that the property is not to vest until the purchase-money is paid or secured, does not pass the title to the vendee until the condition is performed.

The legislature of 1877 enacted (Session Laws, p. 170) "that no sale, contract or lease, wherein the transfer of title or owner-

ship of personal property is made to depend upon any condition, shall be valid against any purchaser or judgment creditor of the vendee or lessee, in actual possession, obtained in pursuance of such sale, contract or lease, without notice, unless the same be in writing, signed by the vendee or lessee, and a copy thereof filed in the office of the clerk of the county within which such vendee or lessee resides," etc.

Campbell Printing Press & Mfg. Co. v. Dyer, 46 Nebr., 830, 833, 835.

The statute of 1877 was in effect a legislative command that the decision in the *Aultman Case* should no longer be the law of this state so far as judgment and attaching creditors and purchasers without notice were concerned.

Brome v. Cuming County, 31 Nebr., 362.

Section 8, chapter 7, Compiled Statutes, amended 1895. Session Laws, chapter 7, section 18.

Employment of counsel by county commissioners.

Brotherton v. Brotherton, 14 Nebr., 186.

Session Laws, 1883, p. 224, ch. 40.

Nygren v. Nygren, 42 Nebr., 408, 411.

Judgment for alimony as a lien on real estate.

Brunswick v. McClay, 7 Nebr., 137.

Session Laws, 1881, ch. 26, p. 201.

Larabee v. Klosterman, 33 Nebr., 150, 156.

Assignment of error in motion for new trial.

Dundy v. Richardson County, 8 Nebr., 508. See South Platte Land Co. v. Buffalo County, *infra*.

Haller v. Blaco, 10 Nebr., 36.

Howard v. Lamaster, 11 Nebr., 582.

Thompson v. Merriam, 15 Nebr., 498.

Shelley v. Towle, 16 Nebr., 194.

General Statutes, 1873, p. 923, sec. 68.

Larson v. Dickey, 39 Nebr., 463.

Session Laws, 1879, p. 327, sec. 127.

Form of tax deed.

Hand v. Phillips, 18 Nebr., 593.

This was an action to foreclose a mortgage containing a stipulation for an attorney's fee. The mortgage was dated February 18, 1879. On February 24, 1879, the governor approved the act repealing the act of February 18, 1873, providing for stipulated attorney's fee. General Laws, 1873, p. 98. This repealing act took effect June 1, 1879.

Dow v. Updike, 11 Nebr., 95.

This was a suit on a note, providing for an attorney fee, dated

July 20, 1879, fifty days after the repealing act went into effect. The opinion is to the effect that in the absence of a statute no recovery of a stipulated attorney's fee can be had.

Under the old law it was held that attorney fees must be taxed as costs and kept separate from the judgment. *Rich v. Stretch*, 4 Nebr., 186; *Hendrix v. Rietman*, 6 Nebr., 516; *Heard v. Bank*, 8 Nebr., 10.*

Hardy v. Miller, 11 Nebr., 395. See *Hand v. Phillips*, *supra*.

Heard v. Dubuque County Bank, 8 Nebr., 10, 15.

Session Laws, 1881, p. 212.

Larabee v. Klosterman, 33 Nebr., 150, 157.

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Howard v. Lamaster, 11 Nebr., 582. See *Haller v. Blaco*, *supra*.

Hewerkle v. Gage County, 14 Nebr., 18.

Session Laws, 1885, p. 395, ch. 106.

Liability of county for defendant's witness's fees where he is indicted for a felony.

Interstate Savings & Loan Ass'n v. Strine, 59 Nebr., 27.

On appeal from district court to the supreme court, a finding of the trial court on substantially conflicting evidence will not be disturbed.

The foregoing is simply the doctrine laid down in numerous cases.

The legislature of 1903 enacted the following with an emergency clause: "That in all appeals from the district court to the supreme court in suits in equity, whether now pending or hereafter to be brought to said court, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the supreme court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial *de novo* of such question or questions of fact reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof." Senate File 108. Approved April 10, 1903. Session Laws, 1903, p. 631. *Quære*: Is this a legislative mandamus?

Johnson v. Hahn, 4 Nebr., 139.

Session Laws, 1877, p. 43.

Kittle v. Shervin, 11 Nebr., 65.

County treasurer's authority to sell real estate of taxpayer before exhausting personalty.

*A stipulation for an attorney fee in excess of the legal rate of interest is usurious. *Toole v. Stephen*, 4 Leigh [Va.], 581, cited in *Dow v. Updike*, *supra*. Under the old practice an attorney fee could only be recovered by action of the court. *Rosa v. Doggett*, 8 Nebr., 48. —W. F. B.

Kemerer v. State, 7 Nebr., 130.

Session Laws, 1879, p. 366, sec. 40.

State v. Baushausen, 49 Nebr., 558.

Power of county board to reconsider a claim.

McCormick v. Keith, 8 Nebr., 140, 143. See Heard v. Dubuque County, *supra*.

Midland P. R. Co. v. McCartney, 1 Nebr., 398. See Brunswick v. McClay, *supra*.

South Platte Land Co. v. Buffalo County, 7 Nebr., 253.

Section 70, chapter 77, Compiled Statutes, amended 1883. Session Laws, chapter 67.

Suydam v. Merrick County, 19 Nebr., 155, 159.

State v. Edwards, 26 Nebr., 701, 702.

Equalization of assessment.

State v. Brodboll, 28 Nebr., 254.

Where portions of different school districts go to make up the territory included in a municipal corporation, license moneys collected for the school fund in such municipal corporation, is to be distributed equally among such school districts.

Session Laws, 1895, ch. 63.

In cities and villages where corporate limits form, in whole or in part, more than one school district all money derived from fines, penalties and licenses shall be apportioned to these several districts in proportion to the number of persons of school age residing in each district.

State v. White, 29 Nebr., 288. See State v. Brodboll, *supra*.

Thompson v. Merriam. See Haller v. Blaco, *supra*.

Woods v. Commissioners of Colfax County, 10 Nebr., 552.

County not liable for negligence in not repairing bridge.

Session Laws, 1889, ch. 7.

County made liable by legislative enactment.

Hollingsworth v. Saunders County, 36 Nebr., 141.

County held liable except in case of contributory negligence on the part of the person injured.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1902.

PRESENT:

HON. J. J. SULLIVAN, CHIEF JUSTICE.

HON. SILAS A. HOLCOMB,
HON. SAMUEL H. SEDGWICK, } JUDGES.

DEPARTMENT No. 1.

HON. WILLIAM G. HASTINGS,
HON. GEORGE A. DAY,
HON. JOHN S. KIRKPATRICK,

DEPARTMENT No. 2.

HON. JOHN B. BARNES,
HON. WILLIS D. OLDHAM,
HON. ROSCOE POUND,

DEPARTMENT No. 3.

HON. EDWARD R. DUFFIE,
HON. JOHN H. AMES,
HON. I. L. ALBERT,

COMMISSIONERS.

ANNA M. WEBSTER v. JOSIAH L. KECK.

FILED FEBRUARY 19, 1902. No. 11,055.

Commissioner's opinion, Department No. 1.

1. Bailee: LIEN: AGREEMENT. "A lien does not attach in favor of a bailee of goods if inconsistent with the terms of the agreement, express or implied, under which his possession was obtained." *Moline, Milburn & Stoddard Co. v. Wood Mowing & Reaping Machine Co.*, 49 Nebr., 869.
2. ———: ———: ———: TENANT. Agreement to permit tenant under an expiring lease to leave his goods *in statu quo* for an agreed

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sum of \$10, payable monthly, with no right to retain goods to end of month, and no right to demand payment on removal reserved by the contract, creates no lien on the goods for unpaid storage.

ERROR from the district court for Buffalo county. Tried below before SULLIVAN, J. *Reversed.*

William Gaslin, for plaintiff in error.

E. C. and H. V. Calkins, *contra.*

HASTINGS, C.

In this action of replevin, at the close of the testimony, the court orally instructed for a verdict in favor of defendant: "That we find that at the commencement of this action the defendant had the right of possession of the goods described in the petition and special interest therein and that the value of his special interest is the sum of \$85 and assess his damages for the detention at one cent." Plaintiff in error filed a motion for a new trial, with ten assignments of error; the first six being to the point that the state of the evidence did not warrant the action of the court; the seventh being for errors of law occurring at the trial; the eighth, that there was no finding as to the value of the property; the ninth, that there was no finding as to ownership; and tenth, that the verdict is not supported by the pleadings, as defendant merely denied generally. These assignments are renewed in the petition in error, with the additional one that the court instructed orally for the verdict. It is not necessary to consider this, as no objection on that ground was taken in the lower court either at the time or in the motion for a new trial. It seems equally unnecessary to examine the complaints as to the form of the verdict. It has been repeatedly held that a defendant under a general denial may prove and recover for attachment liens upon the property replevied. *Horkey v. Kendall*, 53 Nebr., 522, 527; *Merrill v. Wedgwood*, 25 Nebr., 283. It is hard to see why a warehouseman's lien, if it exists, should not be equally privileged to

Webster v. Keck.

be shown without pleading. It has also been expressly held that a finding for defendant that only fixes his right of possession and the value of his interest is sufficient, if within the value of the property as shown by the evidence. *Heffley v. Hunger*, 54 Nebr., 776. In this case we find no evidence of any value in the property, but it is alleged by plaintiff as being something over \$100 at the commencement of the action, and plaintiff can hardly be heard to claim its value would not support a finding of an \$85 interest in defendant.

The question mainly argued by counsel is whether or not any warehouseman's lien was in fact shown. Plaintiff claims that no actual keeping of a public warehouse was shown, and that defendant's evidence, so far as it went, tended merely to show a special contract for storage by the month, and no lien arose. Counsel for defendant seems to concede that, if there was any agreement inconsistent with a retention of possession on the part of defendant until payment, there can be no lien. The contention of plaintiff is that the agreement for payment by the month is inconsistent with such retention; that under it there could be no claim for payment until the expiration of a month, and no agreement that the property should remain for that length of time was shown. It seems that plaintiff's husband had been tenant of the building, and, at the close of his tenancy, asked leave to permit this property to remain until such time as it should be required to be moved. The property consisted of bricks, lumber, and a boiler and a large sheet-iron smokehouse, and was scattered all over the house, and occupied a large share of the floor. The "house" was known as "The Cold Storage Building." Under this arrangement, plaintiff's husband paid \$10 monthly for two months, up to March 1, 1897, and some eight or nine months later she demanded the goods, and was refused them until storage should be paid "according to agreement." She then commenced this action. The action was commenced November 18, and the property removed a few days later. If the fact that plain-

tiff's husband, in arranging that these goods, which apparently had been in use in the building, might remain, agreed that \$10 per month should be paid for such storage, created a lien for storage at that rate, the \$85 was due, and a charge on the goods. The agreement does not seem to have been understood merely as one fixing the rate of payment. It was carried out for two months by the payment of \$10 each month; tending to show that this was not a contract where goods were left in store, to be paid for on delivery. Plaintiff cites *Chase v. Westmore*, 5 M. & S. [Eng.], 180. In this case Lord Ellenborough held that, where grain had been delivered to be ground at 15 shillings a load, the fact that a price had been stipulated did not waive a lien, and that, as no time for payment had been fixed, payment to be made on delivery was presumed, and therefore a right to retain the property for payment remained. He indicates that a fixed time of payment would defeat the lien. *Cowell v. Simpson*, 16 Ves. [Eng.], 275, is also cited. In this case, Lord Eldon held that an attorney, in making a settlement with a client, and taking security for the amount due, waives his lien, and after the security has become due, and he has done other business, he has no lien on the papers in his hands for more than has accrued since the settlement. The implied contract to pay when the business was closed or taken away, having been once done away with, could not be renewed by mere action of law. *Walker v. Birch*, 6 Term Rep., 258, is simply a holding by Lord Kenyon that where cotton factors had received cotton on an express agreement to sell it and pay over the proceeds to the order of the depositor, and they sold it, no balance due from the depositor on other accounts could be charged against it inconsistently with the receipt. In *Chandler v. Belden*, 18 Johns. [N. Y.] 157*, a ship owner, who had agreed to carry salt from Turk's Island to New York for a certain price—\$500 in advance, and the rest in equal payments at 30, 60 and 90 days after arrival in quarantine in New York—was held to have converted the

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salt, in selling it for unpaid freight, though consignees had become insolvent. He was held to have no lien, because of having stipulated a time and manner of payment, especially as the time was subsequent to that of the agreed delivery of the salt. *Stoddard Woolen Manufactory v. Huntley*, 8 N. H., 441, is a case where a clothier, who was to receive his pay quarterly, was held to have no lien upon flannels dressed by him. His agreement to get pay quarterly was held to waive his right to demand his pay before surrendering the goods, which were presumably to be returned as finished and called for. The fact that payment had not been made as agreed could not be held to revive his lien. *Cummings v. Harris*, 3 Vt., 244, is trover for sheep which were to be kept and cared for till a certain time at 67 cents a head. Defendant, after caring for them and delivering their wool under his contract, refused to give them up until he should get his pay. The trial court was asked to instruct that he had no right to hold them, and refused to do so. This is held error. He had contracted for a definite sum, and reserved no lien. There was no stipulation for payment before they were taken away, and apparently none to leave them the full time. It does not appear whether or not they were kept the full time. In *Crawshay v. Homfray*, 4 B. & Ald. [Eng.], 50, a usage to pay a wharfinger at Christmas, whether the property was removed sooner or not, was held to prevent a lien on property that remained after that time without payment. See, also, *Moline, Milburn & Stoddard Co. v. Wood Mowing & Reaping Machine Co.*, 49 Nebr., 869. In this last case the fact that goods were held under a contract to be shipped on demand, and that a sight draft was to be drawn for any amount due, seems to be the main reason for holding there was no right to retain possession till payment and so no lien. The making of an agreement for monthly payments, with no agreement that the property should remain that long, or for payment when it should be removed, would seem to be inconsistent with a lien on defendant's part. If such a con-

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tract is derivable from the evidence, the case should have been submitted to the jury on this question. If the contract, under the evidence, can not be regarded as one for general storage merely at a fixed rate, with no time of payment agreed upon, then the instruction should have been for plaintiff. It seems clear from the cases cited that if payment is to be made at a specified time, and there is no agreement that the goods remain till that time, the lien arising from an implied understanding that payment is to be made before delivery of the goods can not arise. Some of these cases—especially the older ones—use language implying that any specific contract does away with the implied one. It seems, however, to be clear that this is the case only when the express agreement is of such a nature as to indicate the parties did not intend also to be bound by the implied one to pay on delivery.

It is therefore recommended that the judgment of the district court be reversed, and the cause remanded.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

HENRY M. SNELL, ADMINISTRATOR, APPELLANT, v. WILLIAM H. MARGRITZ ET AL., APPELLEES.

FILED FEBRUARY 19, 1902. No. 11,123.

Commissioner's opinion, Department No. 1.

1. **Assignment of Note: MORTGAGE.** An assignment of a note secured by a mortgage, carries with it the mortgage, and operates as a transfer thereof, without a formal written assignment.
2. **Payment: SURRENDER: DEMAND: RISK.** A purchaser of land incumbered by a mortgage showing that it was given to secure a negotiable note paid the amount of said note to the original mortgagee, there being no assignment of the mortgage of record, and secured from the mortgagee a release of the mortgage.

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Held, that in paying to the original mortgagee before the note was due without demanding a surrender of the note, he assumed the risk that it might be held by some one other than the mortgagee.

APPEAL from the district court for Colfax county.
Heard below before HOLLENBECK, J. *Reversed*.

Flansburg & Williams, for appellant.

George H. Thomas, contra.

DAY, C.

This suit was instituted in the district court of Colfax county to foreclose a mortgage upon certain lands owned by the defendants Reisch. Upon the trial the court found the issues in favor of the defendants and dismissed the suit. The plaintiff appeals.

The facts necessary to an understanding of the questions raised by this appeal are, briefly, as follows: On November 14, 1887, Wm. H. Margritz and Lucinda Margritz, his wife, being the owners of the land in suit, executed and delivered their negotiable promissory note for \$1,000 to the order of C. H. Toncray, due and payable November 1, 1892. To secure the payment of this note, they executed the mortgage which is now sought to be foreclosed. The title to the lands subsequently passed from Margritz to Milo L. Carpenter, who, on October 24, 1889, conveyed them to the defendants Reisch. Toncray indorsed the note in blank, and each of the interest coupons thereto attached, and delivered them and the mortgage securing the same, together with the abstract of title, to a broker in New Haven, Connecticut, who, on May 1, 1888, sold said note and mortgage for full value to George Bull, who ever since has been the owner and holder of said note and mortgage. Upon the maturity of the note, the same not having been paid, Bull instituted this suit to foreclose the mortgage. While the suit was pending, Bull died, and Henry M. Snell, administrator of his estate, was substituted as party plaintiff. Carpenter conveyed the land

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to Frank and George Reisch by a deed dated October 21, 1889, but which was not acknowledged till October 24, 1889. Apparently as part of the transaction, Frank Reisch, who was conducting the business, paid to C. H. Toncray the amount due upon the note and mortgage, and procured from him a release of said mortgage, dated October 23, 1889. This release and the deed were filed for record at the same time on the following day. The only evidence which tends to elucidate the transaction or to explain it in any manner is the testimony of Carpenter, who swears that Frank Reisch, after deducting the mortgage indebtedness from the agreed price, gave him a check for the balance, to wit, \$1,332.60. The witness says: "I went to Fremont with Mr. Reisch and saw Mr. Toncray in regard to the claims that he had on the land. I think he made his arrangements with Mr. Toncray with reference to the payments. I know that I never received any part of the mortgage money." The testimony of this witness makes it clear that Reisch settled with Toncray, and obtained the release of the mortgage which he filed with his deed. There is no question of agency involved in this transaction. The question presented by the record is whether a party may safely pay the amount of a negotiable note and mortgage, before due, to the original mortgagee, without a surrender of the note and mortgage, there being no assignment of the mortgage on record. It has been held by this court that an assignment of the note secured by a mortgage carries with it the mortgage, and operates as a transfer thereof without a formal or written assignment. *Goodwin v. Cunningham*, 54 Nebr., 11; *Anderson v. Kreidler*, 56 Nebr., 171; *Cram v. Cotrell*, 48 Nebr., 646. The mortgage was recorded, and showed on its face that it was given to secure a negotiable note. Reisch, in settling with Toncray upon the supposition that he was still the owner and holder of the note and mortgage, did so at his peril, and assumed the burden of showing that he was the proper person to receive it. In *Richards v. Waller*, 49 Nebr., 639, this principle is recognized, as shown from the following

excerpt from the syllabus: "One who makes payment to a second person, not the owner of a note and not in possession of it, of money to be applied in payment of the debt thereby evidenced, assumes the burden of proving that the party to whom payment was made was empowered to collect the money." *South Branch Lumber Co. v. Littlejohn*, 31 Nebr., 606. In *Griffith v. Salleng*, 54 Nebr., 362, it is said, quoting from the syllabus: "A purchaser of land incumbered by a mortgage showing on its face that it was given to secure a bond with negotiable coupons attached representing the interest instalments, paid to the holder of the bond the amount thereof, took from him a release of the mortgage and paid to his vendor the remainder of the purchase price. Some of the interest coupons had been assigned to a third person and were overdue and unpaid. Held, That the holder of the interest coupons might maintain an action to foreclose the mortgage for default in their payment." We are cited by the appellee to the cases of *Whipple v. Fowler*, 41 Nebr., 675; *Cram v. Cotrell*, 48 Nebr., 646; *Bullock v. Pock*, 57 Nebr., 781, and *Porter v. Ourada*, 51 Nebr., 510, and kindred cases, where the rule is announced that, where a debt secured by a mortgage has been assigned, but no assignment of the mortgage is placed on record, an innocent purchaser of the mortgaged premises will be protected by a release of the mortgage executed by the original mortgagee. The rule above announced, however, has no application to the facts now being considered. In this case there was no reliance upon the record that the mortgage had been satisfied. Not only did Reisch know of the existence of the mortgage, but undertook personally the responsibility of paying it and discharging the lien. In paying the mortgage to the original mortgagee without demanding the note, he assumed the risk that it might be held by some one other than the original mortgagee.

Under the evidence in this case we think the court should have entered a decree of foreclosure for the plaintiff for the amount prayed in the petition. We therefore

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recommend that the judgment be reversed with directions to enter a decree of foreclosure for plaintiff for the amount prayed in the petition.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and cause remanded, with directions to enter a decree of foreclosure for plaintiff for the amount prayed in the petition.

REVERSED WITH DIRECTIONS.

JOHN HOPKINS, WARDEN, v. STATE OF NEBRASKA, EX REL.
OMAHA COOPERAGE COMPANY.

FILED FEBRUARY 19, 1902. No. 11,020.

Commissioner's opinion, Department No. 2.

1. **Mandamus: REPLEVIN: WARDEN OF PENITENTIARY.** Where an order of replevin was issued against the warden to recover possession of specific personal property situated within the yard of the penitentiary of this state, and he, as such officer, refused to allow the sheriff holding such process for service to enter that institution to make proper service of and execute the writ, *held*, that it was the warden's duty to permit proper service and execution thereof, and mandamus would lie to compel him to perform such duty.
2. **Adequate Remedy at Law.** Facts in this case examined, and it is *held* that there was no such adequate remedy at law in the case as would make it necessary to deny the writ of mandamus.
3. **Affidavit: ALTERNATIVE WRIT: SUBMISSION UPON PLEADINGS.** Where the affidavit, the alternative writ of mandamus and the return of the respondent thereto present no disputed question of fact for trial, and the case is properly submitted on the pleadings alone, a judge of the district court has jurisdiction at chambers to allow the peremptory writ. *Linch v. State*, 30 Nebr., 740; *Byrum v. Peterson*, 34 Nebr., 237.

ERROR from the district court for Lancaster county.
Tried below before HOLMES, J. *Affirmed*.

Constantine J. Smyth, Attorney General, Willis D. Old

ham, Deputy, Paul Pixey and George F. Corcoran, for plaintiff in error.

Ed P. Smith, contra.

BARNES, C.

This action comes to this court on a petition in error from the judgment and order of the district court for Lancaster county awarding a writ of peremptory mandamus against the plaintiff in error. The record shows that this action was commenced in the name of the state, on the relation of the Omaha Cooperage Company, against the plaintiff in error herein. The affidavit of relator and the alternative writ set forth, among other things, that a certain contract prior thereto had been entered into between the Lincoln Cooperage Company and the state of Nebraska, under which the Lincoln Cooperage Company had erected and moved within the yards of the Nebraska penitentiary a large amount of machinery and materials to be used in the manufacture of cooperage under the contract; that at the expiration of the contract the Lincoln Cooperage Company was notified by the warden to remove the machinery and property from the yards and grounds of the penitentiary; that thereafter the Lincoln Cooperage Company sold its property so situated within the penitentiary yard to the Omaha Cooperage Company; that the Omaha Cooperage Company was permitted to remove a portion thereof, but two hundred and seventy-two thousand staves still remained in the yard, and the warden refused to permit the Omaha Cooperage Company to remove them. The record further shows by the affidavit and alternative writ, that after the warden refused to permit the removal of the two hundred and seventy-two thousand staves the Omaha Cooperage Company commenced an action in the district court for Lancaster county to replevy the staves from the plaintiff herein, John Hopkins, the warden of the penitentiary, and filed its affidavit and petition in due form of law; that upon the filing of said

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petition and the proper affidavit, a writ of replevin was duly issued out of the office of the clerk of the district court of Lancaster county, directed to the sheriff of said county, ordering him to seize and take into his custody the property therein described, to wit, two hundred and seventy-two thousand staves, and deliver them to the Omaha Cooperage Company, the plaintiff therein; that the sheriff attempted to execute the writ and take said property into his possession; that the property was stored within the grounds and walls of the penitentiary yard, and the defendant, John Hopkins, plaintiff herein, as warden of the penitentiary, refused to permit the sheriff to enter upon or into the yard where the staves were stored or piled, and thus prevented the sheriff from executing the writ of replevin, and from taking possession of the property and turning it over to the plaintiff, the Omaha Cooperage Company, thereunder. It is further shown that the said Hopkins did not claim any title in the staves, nor did he claim any lien thereon by virtue of any contract with the Lincoln Cooperage Company or otherwise. The only claim made by the warden was, that the Lincoln Cooperage Company owed the state an unsettled amount due upon its contract heretofore mentioned. The record further shows that the staves were located and piled in the yards of the penitentiary in such a way that they could be removed without in any way interfering with, disturbing or molesting the prisoners confined in the penitentiary, and without in any way rendering liable their escape, and without interfering with the care, control or discipline of the same; that they were so located that no inconvenience or wrong could result to the control or management of the penitentiary or its inmates by permitting the sheriff to properly and lawfully execute the writ of replevin. The return of the respondent to the alternative writ of mandamus admitted all the allegations of fact set forth in the affidavit of the relator and in the alternative writ, except the genuineness of the sale of the property. In justification of his action in refusing to

permit the sheriff to enter and serve the writ of replevin and execute the same by taking possession of the staves and turning them over to the plaintiff in the replevin suit, the respondent, the warden of the penitentiary, simply answered that it was not his duty to permit the sheriff to enter, and denied that the sheriff had any legal right to enter upon the penitentiary grounds for the purpose of executing the writ. It was also stated in the return that the Lincoln Cooperage Company was indebted to the state of Nebraska, as a further justification of his refusal to permit the sheriff to enter and execute his writ. On the hearing before Judge Holmes, which was had in vacation, the judge found that there were no material facts controverted by the respondent; that the question of the validity of the sale could be litigated alone in the replevin action. No evidence was introduced or offered, but the case was submitted upon the affidavit, the alternative writ, and the answer of the respondent thereto. The judge therefore granted a peremptory writ of mandamus against the warden, the plaintiff herein, compelling him to permit the sheriff of Lancaster county to enter into and upon the yard and grounds of the penitentiary for the purpose of executing the writ of replevin then in his hands. From this order the respondent has prosecuted error to this court.

1. It is contended by the respondent that it was his duty, as warden of the penitentiary, to exclude and keep without the walls of that institution every person not specifically designated in the statutes as entitled to admission therein; that the sheriff, armed with a writ of replevin for the recovery of specific personal property situated within the prison yard, issued by the district court of Lancaster county, was not so designated in the statutes, and therefore he had the right, and it was his duty, to exclude such officer, and prevent the execution of the process of the court. We can not so hold. Section 195 of the Code of Civil Procedure specifically provides that when the sheriff or other officer has in his hands a writ of

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replevin he "may break open any building or inclosure in which the property claimed, or any part thereof, is concealed; but not until he has been refused an entrance into said building or inclosure and the delivery of the property, after having demanded the same." It would thus seem that the sheriff of Lancaster county was empowered to break into the inclosure in which the staves were situated in order to execute his writ. We commend, however, his conservative action and good judgment in not so doing, but in resorting to the courts for the writ of mandamus herein. There should be no place, office or institution within the borders of this state where the officers of the law can not go to make service of the orders and process of our courts in a suitable, legal and orderly manner. It can not be said that any of our officers created by law are above the law itself, and exempt from its obligations. Many instances may be cited where the process of our courts must be served within the penitentiary. It frequently occurs that persons confined therein are ordered by the courts to appear and give evidence in judicial proceedings pending in such courts many miles from that institution. It is the duty of the officer when such order is issued and placed in his hands, to go to the penitentiary, make service of his order therein, and transport the convict to the place where such court is held. It is the duty of the warden to admit such officer to the prison, allow the order to be served, and obey its commands. When a writ of habeas corpus is issued by a court of competent jurisdiction on behalf of one confined within the penitentiary, and is placed in the hands of the proper officer for service, it is customary for such officer to go into the prison, execute his process, and bring the person designated therein, together with the warden, before the court issuing the writ. In such cases it is the duty of the warden, as such officer, to permit the service, and obey the commands of the writ. Although such duty may not be specifically set forth in the statutes, it is a duty which arises out of and results from the office of the respondent.

He can not take the position that it is his duty, as such officer, to exclude the sheriff from the penitentiary, and thus prevent the service of the process of the court, and, if mistaken, then say that it was not his duty to admit the officer and permit him to serve his writ. We hold that it is the duty of the warden of the penitentiary, when, as in this case, it can be done without injury to the institution, its inmates, its proper and orderly conduct and its discipline, to admit within its walls the officer of the court armed with its process, and permit the legal and orderly service of the same; that in case he, as such officer, refuses to do so, mandamus will lie to compel him to perform such duty.

2. It is urged that the peremptory writ of mandamus should not have been allowed because the relator had an adequate remedy at law; that, if the writ of replevin could not be served, and the property turned over to the relator, the action could have proceeded as one for damages. The Code provides in an action of replevin, when the property claimed has not been taken, or has been returned by the sheriff for want of the statutory undertaking, that the action may proceed as one for damages only. Code of Civil Procedure, sec. 193. This in effect changes the suit from replevin to conversion. This can only be done, however, where the property can not be found, taken, and delivered to the plaintiff, or where he can not give the statutory bond. In such a case the remedy may or may not be adequate. The action of conversion or trover has always existed at the common law. The legislature of this state, however, has created the statutory action of replevin, in which the plaintiff may immediately recover and take into his possession the specific articles of personal property which are being wrongfully withheld from him. It was evidently the belief of the lawmakers that such an action afforded a surer, speedier and more adequate measure of relief for the wrong complained of than trover or conversion. This is true in most instances. Take, for instance, the case at bar. The relator was en-

gaged in manufacturing. It needed the staves described in the writ of replevin for its immediate use in carrying on its business. It could ill afford the delay necessary to procure other like material from a distant market. If it could obtain possession of these staves, it could use them at once, and with profit, in making up its manufactured product. The bare market value thereof at the end of a protracted litigation would not be an adequate remedy at law in such a case. Again, a judgment against respondent might have been absolutely worthless. The officer knew where the material was. If allowed to execute his writ, he could at once take it, and turn it over to the relator, and it could without delay proceed with its business. A remedy which is used to enforce a right or the performance of a duty, unless it reaches the end intended and actually compels the performance of the duty contemplated, is not adequate. Mandamus is not excluded by other legal remedies which are not adequate to secure the specific relief needed. We therefore hold that there was no such adequate remedy at law in this case as would defeat the relator's right to the writ of mandamus.

3. It is further urged that the district court did not have jurisdiction at chambers, in this case, to allow the peremptory writ, and for that reason the judgment should be reversed. The return to the alternative writ of mandamus admitted all the facts set forth in the affidavit and the writ. It was alleged, however, by the respondent, that the Lincoln Cooperage Company was indebted to the state of Nebraska, and therefore he should be permitted to hold the property in controversy, and prevent the execution of the writ. It was admitted, however, that neither the state nor the respondent had any lien upon the staves in question. It was further stated in the return that the sale of the property in question by the Lincoln Cooperage Company to the relator was not a bona-fide transaction. Neither of these facts constituted a defense to the issuance of the peremptory writ. They might have been considered and litigated in the replevin suit, but certainly not in this

proceeding for the writ of mandamus. Therefore the district judge was right in holding that there was no controverted fact in issue upon the hearing; that the right to the peremptory writ should be determined without the introduction of any evidence, and upon the affidavit, alternative writ, and the return of the respondent thereto. In fact, no evidence was offered by the respondent. It was held in *Linch v. State*, 30 Nebr., 740, and *Byrum v. Peterson*, 34 Nebr., 237, that where there was no controversy as to any essential facts, the judge of the district court had authority to grant the peremptory writ of mandamus at chambers.

We therefore hold that Judge Holmes, at the time he allowed the peremptory writ of mandamus in this case, had full power and jurisdiction so to do. We further hold that there is no error in the record and proceedings herein, and that the judgment and order of the district court should be affirmed.

POUND, C., concurs.

OLDHAM, C., having been of counsel, took no part in the hearing.

By the Court: For the reasons stated in the foregoing opinion, the judgment and order of the district court herein is

AFFIRMED.

NEBRASKA MERCANTILE MUTUAL INSURANCE COMPANY v.
JOHN J. SASEK.

FILED FEBRUARY 19, 1902. No. 11,151.

Commissioner's opinion, Department No. 2.

1. **Cumulative Instructions.** It is not error to refuse to give an instruction, where, at the request of the same party, another one is given, making the giving of the first instruction requested unnecessary.
2. **Insurance: ADDITIONAL INSURANCE: WAIVER.** Where it is provided in an insurance policy that no additional insurance shall be

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taken out on the property described therein without the consent of the company, procuring additional insurance without such consent renders the policy void. But the secretary or other officer of the company, empowered to waive such condition, may do so by an indorsement on the policy, and thereby revive and continue it in force as a contract of insurance.

3. **Insurance Policy: ACTION: WAIVER.** In an action on an insurance policy, where the question as to whether or not the proper officer of the company, empowered so to do by the policy, has waived the provision against additional insurance and consented thereto by an indorsement thereon, is properly raised by the pleadings, and is submitted to a jury upon conflicting evidence, under proper instructions, this court will not disturb the finding of the jury upon that question.
4. **Conflicting Evidence.** Where there is a sharp conflict of evidence upon any material question of fact put in issue by the pleadings in the trial of a case, and each side is supported in its contention by nearly an equal number of witnesses, the verdict of a jury based on such conflicting evidence will not be disturbed or set aside.
5. **Fire Insurance Policy: UNCONTRADICTED EVIDENCE.** In an action on an insurance policy for the loss of a stock of goods by fire, covered by it, where there is some competent evidence of the value of the property insured, and this evidence is not controverted or questioned in any manner by the insurance company, the verdict of a jury based thereon will not be set aside for want of evidence to sustain it.

ERROR from the district court for Saline county. Tried below before HASTINGS, J. *Affirmed.*

Fayette I. Foss, Edwin M. Coffin, B. V. Kohout and Elliott J. Clements, for plaintiff in error.

A. S. Sands and Frank H. Woods, *contra.*

BARNES, C.

This action was originally commenced in the district court of Saline county by John J. Sasek against the Nebraska Mercantile Mutual Insurance Company on a policy of insurance issued by it to Sasek, Prokop & Co., of Swanton, Saline county, Nebraska, on the 16th day of December, 1897, for a period of one year, for the sum of \$1,000, upon a stock of general merchandise situated in the store

of said company in that town. The petition was in the usual form in such cases, and set forth the fact that on the 27th day of July, 1898, Sasek, Prokop & Co., to whom the policy was issued, assigned the same to John J. Sasek; that a copy of the assignment was forwarded to the insurance company and was approved, in writing on the back thereof, by the secretary of said company. It was alleged, in addition to said fact, that on the 8th day of February, 1898, Sasek, Prokop & Co. obtained additional insurance upon the same stock of goods in the Home Fire Insurance Company of Omaha for the sum of \$1,500; that notice of that fact was set forth in the assignment made by Sasek, Prokop & Co. to Sasek, and that the insurance company, with full knowledge of such fact and with the assignment duly indorsed on the back of said policy, containing such statement and notice, which was before its officers at the time, by the act of the secretary of the company, who was duly authorized thereto, agreed and consented to the assignment, and approved the said additional insurance, and kept and allowed its said policy to remain in full force and effect. An answer was filed to this petition by the insurance company, admitting the issuance and delivery of the policy sued upon, and the assignment thereof to Sasek, and, as a defense to the action, set forth the by-laws of the company, by which it claims Sasek, being a member of this mutual company, was bound, and the following conditions contained in the policy: "This entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void if the assured shall not have, or hereafter shall make, or procure any other contract of insurance; whether valid or not, on property covered in whole or in part by this policy. This policy is made and accepted subject to the foregoing stipulations and conditions together with such other provisions, agreements or conditions as may be indorsed hereon, or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this

policy may be subject of agreement indorsed hereon or added hereto, and as to such provisions or conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon, or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the assured, unless so written or attached." After pleading these conditions the company concluded its answer substantially as follows: And the defendant also alleges that all of the above provisions, by-laws, etc., were in force at the time of the issuance of said policy; that said policy was issued under the laws of the state of Nebraska, governing mutual insurance companies; that when said plaintiff took out said additional insurance in the sum of \$1,500, which was done on the 8th day of February, 1898, the defendant had no knowledge of the same, nor was the defendant or its agents ever notified or advised of the same; and that the defendant did not consent to the same, and that it could not, by law, consent to the same, and therefore that said policy became void and of no force and effect. Sasek replied to the answer substantially as follows: Plaintiff replies and says that when the policy was assigned from Sasek, Prokop & Co. to John J. Sasek on July 27, 1898, that the words "with \$1,500 concurrent insurance" were written in said assignment, and that the company thereby must have had knowledge of the said concurrent insurance, and therefore they are estopped from denying the same. On this principal issue the cause was tried to a jury. The trial resulted in a verdict and judgment against the insurance company, and it thereupon brought the case to this court on a petition in error.

1. It is claimed by the plaintiff in error that the court erred in overruling its objection to the introduction of any evidence, because the petition did not state facts sufficient to constitute a cause of action. The substance of this claim is that the policy became void on and after the tak-

ing out of the additional insurance on February 8, 1898; that these facts appeared from the petition, and therefore no cause of action was stated. Plaintiff seems to have lost sight of the fact that the petition stated that certain acts were done by the secretary of the company, which, if true, were sufficient to revive the policy, continue it in full force and assign it to the defendant Sasek. We hold that the petition did state facts sufficient, if true, to constitute a cause of action, and that the objection was properly overruled. We agree with the plaintiff that the procuring and taking out of the additional insurance on February 8, 1898, taken in connection with the conditions of the policy, rendered it void. There can be no doubt but that it remained void, and of no force and effect, unless it was renewed and reinstated by the assignment, and the acts of the secretary of the company consenting thereto on July 27, 1898. The fact as to whether or not the plaintiff, with full notice and knowledge of and concerning the additional insurance on July 27, 1898, consented thereto and agreed to the assignment of the policy to the defendant, and thus continued it in force as a contract of insurance, was practically the only question at issue in the trial of the case. This was the only controverted question which by the instructions of the trial court was submitted to the jury. Therefore the plaintiff's second contention, that the court erred in refusing to give the jury instruction No. 1 at its request, which directed the jury to return a verdict in its favor, can not be maintained. With this issue before the jury, and a conflict of evidence thereon, it was not proper for the court to instruct the jury to return a verdict for either party.

2. Plaintiff at the trial requested the court to give the jury the following instruction: "5. The jury are instructed that the witness, Alois Slepicka, is what is known as an 'insurance broker,' and an insurance broker is the agent of the insured; and that all the acts that he does in procuring insurance for the insured, the insured will be bound by, and that notice to the said Alois Slepicka, he

being the agent of the insured, would not be notice to the defendant herein." The court refused this request, and the plaintiff contends that such refusal was error. An examination of the record shows that there was no evidence offered, given or received that Alois Slepicka was or claimed to be the agent of the plaintiff, and no claim was made on the trial that plaintiff was bound by his acts, or that notice to him was notice to the plaintiff. As before stated, the only question in issue was whether the assignment on the back of the policy gave notice to the secretary of the plaintiff, and whether or not, under the circumstances, his act in consenting in writing to such assignment and condition waived the conditions of the policy, revived it, and thus rendered it a valid contract of insurance. The court, at the plaintiff's request, gave the following instruction: "You are instructed that it devolves upon the plaintiff to prove by a preponderance of the evidence that when the policy was received by the defendant company, July 27, 1898, at Lincoln, Nebraska, it was indorsed 'with \$1,500 concurrent insurance' and that the company, with such indorsement thereon, consented thereto. If the plaintiff fails to so establish then you must find in favor of the defendant." The giving of this instruction rendered the former one entirely unnecessary, and the court did not err in refusing to give it.

3. It is urged that the court erred in refusing to allow the application to be introduced in evidence. We can not so hold. The court rightly held that the policy had been rendered void by the taking out of the additional insurance, and that no recovery could be had thereon unless the plaintiff, with full knowledge of the facts, had consented to the assignment of it and to the additional insurance, and thus revived it or continued it in force. Therefore this evidence was rightly excluded as immaterial. We have examined the record to ascertain whether or not any errors were committed in receiving and rejecting evidence, and find nothing therein which shows any prejudicial error. Indeed, all of the rulings of the court seem to have been most favorable to the plaintiff in error.

4. It is strenuously urged that the evidence does not sustain the verdict, in this: that it does not show that the plaintiff's officers, with knowledge of the facts relating to the additional insurance, ever approved thereof or consented thereto, by approving the assignment of the policy when it contained the words, "With \$1,500 concurrent insurance." An examination of the evidence shows that four witnesses, of presumably good reputation, testified that the words, "With \$1,500 concurrent insurance," were in and a part of the assignment on the 27th day of July, 1898, when it was sent to the plaintiff for its approval and consent thereto. One officer of the plaintiff, and the stenographer in the plaintiff's office, testify that those words were not in the assignment at that time; and one of the plaintiff's officers testifies that he saw the policy immediately after the fire, and that these words were not in the assignment at that date. Thus we have three witnesses testifying against four on this disputed question of fact. The jury, to whom this question was submitted, under suitable and apt instructions from the court, found this fact against the plaintiff in error. We can not disturb such finding. If the question had been submitted to us, knowing the high character and standing of the plaintiff's witnesses, we would have been inclined to have found for the plaintiff; but a court of review can not substitute itself for the jury, and where such a tribunal, with such a sharp conflict of evidence before it, has determined the contested fact, we can not disturb such finding and determination.

5. It is further urged by plaintiff that there was no evidence to show the value of the goods insured at the time of the fire, and therefore the verdict was not supported by sufficient evidence, and should be set aside and the case reversed. We think that the bill of exceptions, as corrected by the order of this court, fairly shows, by at least some competent evidence, that the value of the goods in stock at the time of the fire, and which were all destroyed, was something over \$3,000. This evidence was not con-

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troverted or denied at the trial, and was not questioned by the plaintiff. The total insurance thereon was only \$2,500. Therefore we are constrained to hold that there was sufficient evidence on this point to sustain the verdict. A careful examination of the record fails to disclose any prejudicial error, and the judgment of the district court should be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons set forth in the foregoing opinion, the judgment of the district court is

AFFIRMED.

HOLCOMB, J., not sitting.

CHARLES WESTON, AUDITOR, v. LEE HERDMAN.

FILED FEBRUARY 19, 1902. No. 12,426.

Commissioner's opinion, Department No. 2.

1. **Specific Appropriation: CONSTITUTION: LEGISLATURE.** A specific appropriation "made by law," within the meaning of section 22, article 3, of the constitution of the state of Nebraska, is an appropriation made either by direction of the constitution itself, or one made by the legislature under the forms and in the manner prescribed in the constitution for drawing money from the public treasury.
2. **Reporter of Supreme Court: SALARY: CONSTITUTION: SPECIAL LEGISLATIVE ENACTMENT.** The appropriation for the salary of the reporter and *ex-officio* clerk and librarian of the supreme court is made by section 25, article 16, of the constitution, and requires no special legislative enactment.

ERROR from the district court for Lancaster county.
Tried below before HOLMES, J. *Affirmed.*

Frank N. Prout, Attorney General, and Norris Brown, Deputy, for plaintiff in error.

Frank Irvine and Robert Ryan, contra.

OLDHAM, C.

On the 22d day of July, 1901, the defendant in error presented his voucher in proper form and duly verified to the auditor of public accounts, and demanded that a warrant should issue thereunder for his salary as reporter and *ex-officio* clerk and librarian of the supreme court of the state of Nebraska for the quarter ending July 1, 1901. On presentation of this claim the auditor rejected the same "for the reason that no appropriation has been made by the legislature for the payment of this claim." The defendant in error thereupon appealed the claim from the decision of the auditor to the district court of Lancaster county, Nebraska. When his appeal had been docketed in the district court he filed his petition setting up his appointment and qualification as reporter and *ex-officio* clerk and librarian of the supreme court of the state of Nebraska, and that he had performed services as such reporter, clerk and librarian for the quarter ending July 1, 1901. He also alleged the filing of his claim with the auditor and the action of the auditor thereon, as hereinbefore set out, and prayed that the decision of the auditor be reversed and an order and mandate be issued requiring the auditor to issue a warrant upon the treasury for the amount of his salary for the quarter ending July 1, 1901. To this petition the auditor filed a general demurrer. This demurrer was overruled by the trial court, and, the auditor refusing to further plead, judgment was rendered on the petition as prayed for. From this judgment the auditor has prosecuted error to this court.

There are no disputed facts in this case. The only question involved is as to the authority of the auditor to adjust a claim, and draw a warrant for the salary of the reporter, clerk and librarian of this court, without a specific appropriation having been made for such purpose by the legislature of the state of Nebraska. Section 22 of article 3 of the constitution prohibits the drawing of money from the treasury "except in pursuance of a specific

appropriation made by law." Under our state government an appropriation "made by law" must emanate from an act of the legislature, or from the primary source of power,—the constitution itself.

In the early case of *State v. Weston*, 4 Nebr., 216, it was held that where the constitution fixed the salary of a state officer and provided for its payment quarterly from any funds not otherwise appropriated, that such constitutional enactments operated as an appropriation of the amount necessary to pay such salary, and no legislative enactment was required. In the later case of *State v. Weston*, 6 Nebr., 16, the court properly restricted the rule announced in *State v. Weston*, *supra*, to those officers whose salaries are fixed by the constitution, as distinguished from those whose compensation is left to the discretion of the legislature. In discussing the restrictions enforced by section 22, article 3 of the constitution, the court in this case says: "It will be observed that this provision does not require the appropriation to be made by act of the legislature, but merely that it be 'made by law,' so that it may be done either by direction of the constitution itself, that being the supreme law of the state, or by the legislature through the forms prescribed for drawing money from the public treasury." It is clear from the admitted facts in this case that, if the reporter and clerk of this court is entitled to a warrant on the claim which he filed with the auditor in the case at bar, his right must be founded on a plain direction of the constitution, as it is entirely unsupported by a specific legislative appropriation. Turning now to article 6 of the constitution, we find that it prescribes a specific salary of \$2,500 per annum for each of the judges of the supreme and district courts. We find, also, that it defines the jurisdiction and constitutes the offices of county judge, justices of the peace and police magistrates, without any specific direction as to compensation in the various sections constituting these offices. The only provision for compensation of these latter officers is contained in the concluding portion of section 20, article

6, which says: "All officers, when not otherwise provided for in this article, shall perform such duties and receive such compensation as may be provided by law." Section 8 of article 6 provides as follows: "There shall be appointed by the supreme court a reporter, who shall also act as clerk of the supreme court, and librarian of the law and miscellaneous library of the state, whose term of office shall be four years, unless sooner removed by the court, whose salary shall be fixed by law, not to exceed fifteen hundred dollars per annum." Now, the question is, does this section make a specific direction for the payment of a salary to the reporter and clerk of this court, or is he left in that class of judicial officers whose compensation is only such "as may be provided by law"? We think that a fair construction of section 8 would interpret it to mean that the reporter and clerk of this court should receive a salary fixed by law at not to exceed \$1,500 per annum. The mandate in this section is imperative that the reporter and clerk shall receive a salary, and, second, that such salary shall not exceed \$1,500 per annum. Having thus been provided with a salary, as distinguished from any other kind of compensation, the reporter and clerk of this court is clearly taken out of that class of judicial officers whose compensation is left solely to the discretion of the legislature. Turning then to section 25 of article 16 of the constitution, we find the following provision: "The auditor shall draw the warrants of the state quarterly for the payment of the salaries of all officers under this constitution, whose compensation is not otherwise provided for, which shall be paid out of any funds not otherwise appropriated." Here, then, is an appropriation, by the highest source of civil power, from any unappropriated funds of the state, for the purpose of paying the salaries of all constitutional officers "whose compensation is not otherwise provided for." In obedience to the command of section 8 of article 6, the legislature has enacted section 17, chapter 19, of the Compiled Statutes of Nebraska, which provides: "The reporter of the supreme court, who under the

provisions of section 8, article 6 of the constitution, acts as clerk thereof * * * shall receive an annual salary of \$1,500, payable as the salary of other state officers is paid." Here, then, is an enactment that fixes a specific compensation as salary for the reporter and clerk of this court, within the constitutional limits. While we fully agree with the vigorous contention of the deputy attorney general that this section of the statute is not self-executing, and that, standing alone, it would not carry with it a continuing appropriation for the salary of this office, yet the view we take of the matter is that this statute simply fixes the amount of the salary to be allowed to the reporter and clerk of this court, in obedience to the mandate of the constitution, and that the appropriation for such salary is made by section 25 of article 16 of the constitution.

The only contention urged against the payment of this claim by the deputy attorney general is the fact that the constitution did not fix in specific terms the exact salary which the clerk and reporter of this court should receive. He admits frankly, that if this had been done, the auditor would have no standing in this case, in view of the holding of this court in *State v. Weston*, 4 Nebr., 216. A contention similar to this was urged in the case of *Reid v. Smoulter*, 128 Pa. St., 324, 5 L. R. A., 517. In this case the constitution of the state of Pennsylvania provided for separate orphans' courts in counties of a certain population in that state. It also provided for the offices of clerk and assistant clerk of such courts, and made it the duty of the general assembly to pass such laws as might be necessary to carry the same into full force and effect. At the next session of the general assembly an act was passed providing for a salary of \$1,500 per year for the assistant clerk of the orphans' court. A subsequent legislature repealed this statute providing for this salary. The question arose on the right of the deputy clerk to draw his salary, notwithstanding the act of the legislature in repealing the statute. In determining the question in the clerk's favor, the court

said: "If the legislature may repeal the act adjusting the salary, without making any further or other provision in that behalf, it may practically abolish the office. If the assistant clerk may be thus deprived of the office, the clerk of the court and the judge are both liable to the same fate, and in this way, that might be done by indirection which could not be done directly. It is true that the salary is a matter which, by the constitution, is submitted to the discretion of the legislature. In the exercise of that discretion, by the act of 1874 the salary was fixed at \$1,500, and this rule of compensation will continue until by some other statute it is changed. The salary first fixed may perhaps be increased or diminished, subject to the restriction of the 13th section of the 3rd article of the constitution, as the legislature should from time to time see fit to provide, but to repeal the provision for a salary altogether, is to remove the clerk from his office." The reasoning of this case is supported in principle by the holdings in *State v. Hickman*, 9 Mont., 370; *Thomas v. Owens*, 4 Md., 189; *Reynolds v. Taylor*, 43 Ala., 420. Applying the doctrine of this case to the case at bar, we are constrained to hold that while the legislature might reduce the salary of the reporter and clerk of this court from the amount fixed by section 17, chapter 19, Compiled Statutes, yet it can not entirely abolish the salary of such officer, by failing to make an appropriation for such purpose, for, if it could, then by indirection it would virtually nullify the provision of the constitution creating such office, for, as said by the great dramatist,

"You take my house, when you do take the prop
That doth sustain my house; you take my life,
When you do take the means whereby I live."

It is therefore recommended that the judgment of the district court be affirmed.

BARNES, C., concurring.

I fully concur in the opinion of my Brother Oldham in this case. This court has held in *State v. Weston*, 4 Nebr., 216, and in *State v. Weston*, 6 Nebr., 16, that no

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specific legislative appropriation is necessary to authorize the auditor to draw his warrant for the payment of the salaries of those officers created by, and whose salaries are fixed in, the constitution. The supreme court reporter, ex-officio clerk and librarian, being one of the officers provided for by the constitution, it remains only to inquire whether or not his salary is fixed therein. We think that it is so fixed. That portion of the constitution which creates the office also provides for the appointment of such officer, and that he shall receive a salary to be fixed by law, not to exceed \$1,500 per annum. We believe that this fixes the salary until the legislature, by proper legal enactment, shall change the amount. It may be that the legislature could reduce that amount at a proper time, and by suitable enactment in that behalf; but, until some such action is taken, I hold that the amount of the compensation is fixed at \$1,500 per annum. Such must have been the understanding of the constitution makers. Suppose that after the adoption of the constitution, the organization of the court, and the appointment of the reporter, the legislature had failed to take any action in relation to the salary of such reporter at all, what would have been the result? The clerk could not have been expected or required to serve without any compensation, and without his services the court itself could do no business. Thus the powers of one of the governmental departments provided for by the constitution itself would have been completely paralyzed. Such a condition of affairs could not have been contemplated. The salary of the clerk is fixed by the constitution, and the intention was simply to allow the legislature to reduce the amount thereof, if it should be found too great to be a reasonable compensation for the performance of the duties of the office. In case it were necessary for the affirmance of the judgment of the court below, I would so hold.

POUND, C., concurring.

I concur in the opinion of my Brother Oldham. In ad-

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dition one further remark might be made. It was argued that an appropriation must be certain in amount, and we were cited to the definition in *State v. Wallichs*, 12 Nebr., 407. But it seems to me we may well apply the maxim that that is certain which may be rendered certain. The constitution requires a specific appropriation made by law. In section 8, article 6, of the constitution, and section 17, chapter 19, Compiled Statutes, enacted pursuant thereto, we have such appropriation, within the purview of that phrase. The constitutional provision contemplates and expressly refers to such a general law fixing the exact sum. I can see no reason for not construing them together, and a reference to the statute, which the constitution plainly invites us to make, removes all uncertainty.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

GEORGE W. LEAVITT, APPELLEE, v. S. D. MERCER COMPANY
ET AL., APPELLANTS.

FILED FEBRUARY 19, 1902. No. 9,710.

Commissioner's opinion, Department No. 2.

1. **Misjoinder: DEMURRER: REVIEW.** Rulings upon demurrers for misjoinder of causes of action, will not be reviewed upon appeal.
2. ———: **ANSWER: MISJOINDER ALSO PLEA TO MERITS.** An answer setting up facts which go to show a misjoinder of causes of action, but are also material to the merits, no specific objection being made to the misjoinder, will not be taken to raise such defect.
3. **Certificate of Tax Sale: PRESUMPTIVE EVIDENCE: BURDEN OF PROOF.** The county treasurer's certificate of tax sale is presumptive evidence of a sale to the purchaser named therein, and the burden is upon defendants, who claim sale was made to some one else, to prove such fact.
4. **"Forthwith."** The word "forthwith" in section 111, article 1, chapter 77, Compiled Statutes, means as soon as the county treasurer, in the reasonable course of the orderly conduct of the business of his office, is prepared to receive and properly receipt for the moneys to be paid.

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5. **Purchaser at Tax Sale: DELAY IN PAYMENT.** Delay of a purchaser at tax sale in paying to the treasurer the taxes and costs due on the land sold, owing solely to the large number of tracts of land to be sold, and inability of the treasurer, with the clerical force at his disposal, to make the sale in its regular order at an earlier date, does not invalidate a sale otherwise entirely regular.

APPEAL from the district court for Douglas county. Heard below before KEYSOR, J. Rehearing of case reported in 61 Nebr., 874. *Judgment below modified.*

Albert Swartzlander, for appellants.

Henry P. Leavitt, contra.

POUND, C.

This is a rehearing. At the former hearing the cause was disposed of on the authority of *Green v. Hellman*, 61 Nebr., 875. But the cases differ, in that in this case the lower court held the tax sale valid, and rendered a decree accordingly, whereas in the case cited the decree of the district court went on the theory of an irregular sale, and held the purchaser subrogated to the rights of the county. There the court, without passing upon the question here raised, held that, even if the sale was irregular, the taxes were not avoided by the irregularity. But the decree now before us requires us to construe section 111, article 1, chapter 77, Compiled Statutes, and determine what is meant by payment "forthwith," as there required.

Two other points have been urged upon the rehearing, which may be first disposed of. There seems to have been a misjoinder of causes of action in the petition. Demurrers were interposed upon that ground and overruled. It is clear that we can not review such rulings on appeal, as they are purely interlocutory in character. One of the defendants insists that it raised the objection in its answer. But no specific objection to that effect is to be found therein. Certain facts are set up which go to show a misjoinder. But they are also material to the merits,

particularly to any decree that might be rendered as to costs. We do not think the answer may be said fairly to take the objection. Of course, it can not be taken here in such case. *Claire v. Claire*, 10 Nebr., 54. It is also claimed that the evidence tends to show a sale to one Pierce, and not to the plaintiff's assignor. The county treasurer's certificate of tax sale was presumptive evidence of a sale to the purchaser named therein, and the burden was upon the defendants to prove a sale to some one else. *Battelle v. McIntosh*, 62 Nebr., 647. The treasurer's memorandum relied upon to contradict the certificate does not of itself meet this burden.

With respect to the principal point at issue, we think the decree is right, and that the former judgment should be adhered to. The district court found that the delay in payment "was owing to the fact that the public tax sales for said year were so large that the treasurer, with the clerical force at his disposal, was unable to make out the sale in question at an earlier date, making out said tax sales in their regular order," and that the "said delay was not chargeable to the purchaser at said sale." The word "forthwith," as used in the statute, must be given a reasonable construction consistent with the exigencies of business. So construed, we think it means as soon as the county treasurer, in the reasonable course of the orderly conduct of the business of his office, is prepared to receive and properly receipt for the moneys to be paid. To require the purchaser to pay before the treasurer can receive would be to hold that there can be but very few valid sales, whenever there are a large number to be made. A similar view was taken in construing the word "immediately," in *Huff v. Babbott*, 14 Nebr., 150. Turning to the statutes, we find that the receipt of money in payment of taxes by a county treasurer is hedged about with many formalities. He must "enter such payment in his book, and give a receipt therefor, specifying for whom paid, the amount paid, what year paid for, and the property and value thereof on which the same was paid," and said receipt must bear

his "genuine signature." He must also "enter the name of the owner or of the person paying the tax, opposite each tract or lot of land when he collects the tax thereon, and the post-office address of the person paying said tax." Compiled Statutes, ch. 77, art. 1, sec. 103. The receipt must "describe the land as it is described in the tax-roll and give the valuation thereof," and, in addition, "on the reverse side of the receipt there shall be a statement giving the amount of each kind of tax for each one hundred dollars." Sec. 104. Moreover, the treasurer "shall not receipt for more than one year's taxes on the same property in one tax receipt, but shall keep a separate and distinct series of numbers of receipts issued for the taxes of each year for which the same have been levied and assessed." Sec. 107. Having done all this, the treasurer must enter in his cash book "an account of all money by him received, specifying in proper columns provided for that purpose, the date of payment, the number of the receipt issued therefor, by whom paid, and on account of what fund or funds the same was paid, whether state, county, school, road, sinking fund, or otherwise, and the amount paid in warrants, orders, or receipts, each in a separate column, and the total amount for which the receipt was given in another column." Sec. 106. Next he "shall write on the tax lists, opposite the description of the real estate or personal property whereon the same were levied, the word 'paid,' together with the date of such payment, and the name of the person paying the same." Sec. 108. It must be apparent that there is a limit to the number of payments any treasurer and his deputies can receive in any one day under these statutory requirements. We ought not to ask purchasers to pay faster than the proper officials can take their money.

There seems to be a slight error in the decree in that it is made to bear ten per cent. interest from the first day of the term, contrary to the ruling of this court in *Merrill v. Ijams*, 58 Nebr., 706, 709. Appellee has offered to remit the excess over seven per cent., but we think it would be

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proper to modify the decree to that extent in this court. Accordingly, we recommend that the decree be modified by providing that it bear interest at the rate of seven per cent. per annum, and that, so modified, it be affirmed.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is modified by providing that it bear interest at the rate of seven per cent. per annum, and, as so modified, it is affirmed.

JUDGMENT ACCORDINGLY.

COUNTY OF KEITH V. OGALALLA POWER & IRRIGATION COM-
PANY ET AL.

FILED FEBRUARY 19, 1902. No. 10,760.

Commissioner's opinion, Department No. 2.

1. **Contract: BOND: CONSIDERATION: OBLIGEE.** A bond given to secure performance of a contract between the principal and the obligee is without consideration, if the obligee is not bound by such contract.
2. **Precinct Bond: INTERNAL IMPROVEMENTS: NOTICE: TERMS OF PROPOSITION: AUTHORITY OF COUNTY COMMISSIONERS.** Where bonds are voted by a precinct in aid of a work of internal improvement under section 14, chapter 45, Compiled Statutes, the terms of the proposition set forth in the notice of election are to be taken as defining the authority of the county commissioners in contracting with reference to such improvement.
3. **Strict Compliance.** In such case the voters of the precinct are entitled to demand strict compliance with the contract which they authorized, and a contract differing substantially as to the parties thereto or terms thereof from that voted upon, is not binding upon the municipality.

ERROR from the district court for Keith county. Tried below before SULLIVAN, J. Affirmed.

H. E. Goodall, Gaines, Kelby & Storey, John H. Bower, Edward R. Duffie and James H. Van Dusen, for plaintiff in error.

N. P. McDonald and Edwin E. Squires, contra.

POUND, C.

This is an action upon a bond given by the Ogalalla Power & Irrigation Company and certain sureties to the county of Keith and Ogalalla precinct therein to secure performance of a contract between the company and the county commissioners of said county acting for the precinct. Several questions of importance have been argued, but we deem one of them so decisive that we shall confine ourselves thereto. One Solon L. Wiley presented a written proposition to the county commissioners, proposing to construct a water power and irrigation canal from a point on the South Platte river about thirteen miles above the village of Ogalalla to said village, if bonds of the precinct to the amount of \$35,000 were donated in aid of the enterprise. Upon petition of upwards of fifty freeholders of the precinct the county commissioners called an election, at which the issuance of such bonds was authorized. Thereafter Wiley organized the defendant corporation, which entered into a contract with the commissioners for the construction of a canal and proceeded with the work. The bond in suit was given to secure full performance of that contract. The lower court held, we think correctly, that the contract was invalid, and not binding upon the precinct, and hence that the bond was without consideration, and unenforceable. While at common law a bond was a formal contract, requiring no consideration, there can be no question that our statute abolishing private seals has reduced it to the level of all other agreements and made it a simple contract. *Luce v. Foster*, 42 Nebr., 818. Where a bond is given to secure performance of a contract, the entering into such contract by the obligee is obviously its consideration, and, if the contract made is not binding upon the obligee, and he has done nothing of any legal validity or effect, the bond must fail. Where bonds are voted by a municipality in aid of a work of internal improvement under section 14, chapter 45, Compiled Statutes, the voters are entitled to demand strict

compliance with the contract which they authorized. The section cited provides that notice shall be given prior to the election, as required in cases where bonds are voted by a county; and the statute governing such cases requires that the whole question shall be contained in the published notice. Compiled Statutes, 1901, ch. 18, art. 1, sec. 28. Hence it is manifest that the terms of the proposition set forth in the notice of election are to be taken as defining the authority of the county commissioners conferred by such election. The notice stated that the bonds were to be issued for the purpose of being donated to S. L. Wiley to aid in the construction of an irrigating and water power canal, and that they were not to be delivered to said Wiley until he entered into a good and sufficient undertaking to perform all the terms of "his propositions made to said precinct, and now on file in the office of the county clerk of Keith county." The proposition was signed by Wiley, but purported to be made by Wiley and "his associates or assigns." But we do not think the voters of Ogalalla precinct intended to deal with any such indefinite and unknown persons. They did not vote on the proposition made by Wiley to aid him or his associates or assigns, but their action was limited to a donation to him in aid of his undertaking. Nowhere in the notice is any one else suggested. The reference to the written proposition only incorporates the terms as to what Wiley was to do. It can not supersede the plain and express statement in the notice itself as to the party with whom the precinct was to deal. We do not doubt that it would have been proper for the county commissioners to enter into a contract embodying the terms of the proposition, and to take a bond securing performance of such contract. That would be equivalent to incorporating the terms of the proposition in the bond authorized and required by the election. But they did not do this. Not only did they make a contract with a different person, for Wiley's ownership of stock in the corporation, whatever the amount, would not make them legally identical (*Humphreys v. McKissock*, 140 U. S., 304; *Button*

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v. Hoffman, 61 Wis., 20, 20 N. W. Rep., 667), but they varied the terms of the proposition referred to in the notice of election in many particulars. For instance, the proposition was that Ogalalla precinct should have the use of the water for domestic purposes. But the contract secured by the bond in suit provides only that the company should furnish water to Ogalalla village for domestic purposes, fire protection and water-power. We take judicial notice that Ogalalla village, territorially, is but a small portion of the precinct, and it is obvious that this departure might have altered the result very materially had the voters passed upon the proposition in its changed form. A contract differing substantially as to the parties thereto or terms thereof from that voted upon, is not binding upon the precinct. *George v. Cleveland*, 53 Nebr., 716, and cases cited. In *George v. Cleveland* this court said that the compliance must be "strict and literal." But even if a fair and substantial compliance were sufficient, we think the precinct in this case could have repudiated the contract and prevented its execution, and hence that the bond is unenforceable. *Edwards County v. Jennings*, 33 S. W. Rep. [Tex. Civ. App.*], 585. We have no doubt that the moneys paid out under this contract may be recovered back from those to whom they were paid. Whether the petition was sufficient to authorize a judgment of that kind against the company we need not decide, as the petition in error and the briefs raise no such question. This action is to recover on the bond, and its object is so stated by counsel for plaintiff in error. As there could have been no action on the contract, there can be none on the bond for its non-performance.

We recommend that the judgment be affirmed.

SEDGWICK and OLDHAM, CC., concur.

By the Court: For the reasons set forth in the foregoing opinion, the judgment of the district court is

AFFIRMED.

*This case does not appear in 11 Texas Civil Appeals, its chronological place. It was probably not officially reported.—REPORTER.

SOVEREIGN CAMP OF WOODMEN OF THE WORLD V. HONORA GRANDON.

FILED FEBRUARY 19, 1902. No. 10,864.

Commissioner's opinion, Department No. 3.

1. **Insurance: MUTUAL BENEFIT: DELINQUENT MEMBER: REINSTATEMENT: DEPOSITING LETTER IN MAIL.** The constitution of a mutual benefit association provided that a member suspended for the non-payment of dues and assessments might be reinstated by personally applying therefor and paying to the clerk of his camp all arrearages, and, if in good health, his reinstatement should take place and his certificate again become valid as soon as payment had been received and recorded by the clerk. If the delinquent member does not appear in person to pay his arrearages, he shall then send to the clerk a written statement on an official form to be furnished by the association, to the effect that he is in good health, as a condition precedent to reinstatement, and waiving all rights thereto if his written statement shall be found to be untrue. *Held*, That a suspended member signing the written statement provided for in the above rule, and depositing the same in a letter-box, enclosed in an envelope stamped and addressed to the clerk of the camp, had sufficiently complied with the requirements of the constitution above quoted, although the statement did not reach the clerk until after the death of the suspended member.
2. **Physician.** A physician may testify that he was called to attend a patient, and to the number and dates of his professional visits, as these facts are not privileged under section 333 of the Code of Civil Procedure.
3. —: **WAIVER OF PRIVILEGE: CROSS-EXAMINATION.** In a suit between the representative of a deceased person and an insurance company, the physician who attended the deceased in his last illness was called by the defendant, and testified to the fact of having attended the deceased, and to the time when first called, and some other matters relating thereto, but was not allowed to testify as to the condition of the deceased or the ailment from which he was suffering. The physician, at the request of the plaintiff, had given her a written statement to the effect that the deceased was not seriously sick until the evening previous to his death, and on his cross-examination the physician admitted making the statement, and the same was offered and admitted in evidence as a part of his cross-examination. *Held*, That this constituted a waiver of her privilege on the part of the plaintiff, and that the defendant should have been permitted to re-examine the physician as to the condition of his patient.

4. **Record: BOARD OF HEALTH: PRIVILEGED CHARACTER.** A record kept under the ordinances of a city for the evident purpose of assisting the board of health in the conduct of the affairs of that office, is not such a public record as to be entitled to admission in evidence to show the truth of the matters therein recited, and especially should it be rejected as evidence when offered to establish a fact which would not be admissible against a party because of its privileged character.

ERROR from the district court for Douglas county.
Tried below before POWELL, J. *Reversed.*

Brome & Burnett, for plaintiff in error.

Timothy J. Mahoney and J. A. C. Kennedy, *contra.*

DUFFIE, C.

The plaintiff in error is a mutual benefit association doing a life insurance business in Douglas county, Nebraska, and elsewhere throughout the United States. On June 18, 1894, Thomas Grandon, the husband of the defendant in error, became a member of Alpha Camp, No. 1; and the plaintiff in error issued to said Thomas Grandon its beneficiary certificate, by the terms of which it agreed, in consideration of certain payments made and to be made, to pay the defendant in error the sum of \$2,000 at the death of said Thomas Grandon. Grandon died May 6, 1897, and it is alleged in the petition filed in the district court that at the date of his death he was still a member of said fraternity, in good standing, and the holder of said beneficiary certificate, and died without having in anywise changed the appointee therein. It is further alleged that due notice and proof of the death of said Grandon was furnished to the defendant, but that defendant has wholly failed, refused and neglected to pay the plaintiff the amount due her under said certificate. The answer of the defendant admits that it is a mutual benefit association, and that Grandon became a member of said association in June, 1894, being a member of Alpha Camp, No. 1, located at Omaha, Nebraska; admits that it issued to Thomas Grandon its beneficiary certificate, and alleges

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that it was provided by the terms of said certificate that if Grandon, at the time of his death, should be in good standing as a member of this fraternity, then and in that event it would pay the plaintiff below the sum of \$2,000 at the death of said Grandon. The answer admits the death of Grandon and proof of such death. As a defense to the action, it is alleged that Grandon had failed to comply with the constitution and laws adopted by defendant governing said order and its members; that section 108 of the constitution of the order provided as follows: "On or about the 20th day of each month, the sovereign commander and chairman of the sovereign finance committee shall determine the number of assessments, if any, necessary to provide for the payment of deaths which may be registered for payment and shall so notify the sovereign clerk. In beneficiary head camp jurisdictions, this shall be determined in such manner as its laws may provide"; that section 109 of the constitution is as follows: "Every member of this order, unless otherwise notified by the clerk of his camp, in the manner herein provided, shall pay to the said clerk every month, one assessment in the beneficiary fund, together with one monthly payment of the sovereign camp or beneficiary head camp general fund dues and camp dues, as levied, also any additional assessments for beneficiary fund or special general fund dues, which may have been ordered by the sovereign camp or beneficiary head camp, as the case may be; and if he fails to pay either on or before the first day of the month following, he shall stand suspended, and during such suspension his beneficiary certificate shall be void." The answer further alleges that at the time Grandon became a member, and at all times since, the constitution and laws of the defendant contained the following provision: "Should a suspended member personally appear and apply for reinstatement within three months from the date of his suspension and pay all arrearages, if in good health. he shall be restored to membership and his beneficiary certificate again become valid as soon as said payment

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shall have been received and recorded by the clerk of his camp. If a delinquent member does not appear in person to pay his arrearages, he shall send to the clerk a written statement on the official form, furnished by the sovereign camp or beneficiary head camp, to the effect that he is in good health as a condition precedent to reinstatement and waiving all rights thereto if his said written statement shall be found untrue. If the representations and statements made in said written statement be untrue, then said payments shall not cause his reinstatement." It is further alleged that Thomas Grandon was not, at the time of his death, a member of said fraternity in good standing, for the following reasons: That the amount of each assessment to be paid by said Grandon was the sum of \$1.45; that the amount of camp dues to be paid by him was 30 cents monthly. It is alleged that he failed to pay assessment No. 70 for \$1.45, as well, also, as camp dues for the month of February, 1897, and that by reason of said default and non-payment, his beneficiary certificate became wholly null and void. It is further alleged that assessment No. 71 was duly made by the sovereign commander and chairman of the finance committee on March 20, 1897, for the payment of deaths registered, and April 20, 1897, assessments Nos. 72 and 73 were duly made; that up to May 5, 1897, Grandon had failed to pay assessments 70, 71, 72 and 73, which amount, in the aggregate, to the sum of \$5.80; that he also had failed to pay his camp dues up to May 1, 1897, which amount, in the aggregate, to the sum of \$1.20, and that he had been suspended for such non-payment from and after March 1, 1897. It is further alleged in the answer that on May 5, 1897, the daughter of Thomas Grandon called at the office of the clerk of Alpha Camp, and ascertained the amount necessary to reinstate him, and paid the amount; that the clerk informed her at the time that, Grandon not having called in person and paid the amount, it was necessary for him to send a certificate, as provided by the constitution and laws of the order; that he gave her a blank certificate in the

official form furnished by the sovereign camp, which was to be filled out and signed by said Grandon, and which certificate contained a statement that said Grandon was in good health, as a condition precedent to reinstatement, and waiving all rights thereto if his said written statement shall be found untrue; that on the next day, to wit, May 6, 1897, said certificate, signed by said Thomas Grandon by the making of his mark thereon, was received by the clerk through the United States mail, but that Grandon had died on said day, previous to the receipt of said certificate by the clerk. It is further alleged that Thomas Grandon was not in good health at the time of signing said certificate, and that by reason of the foregoing facts he had never been reinstated in the order, and that the defendant was not liable for the amount of his certificate. A trial of the case resulted in a verdict for the plaintiff below, on which judgment was entered, and the record is brought to this court for review.

One of the controversies between the parties is the meaning of the word "send" found in the following clause of the constitution of the order: "If a delinquent member does not appear in person to pay his arrearages, he shall send to the clerk a written statement on the official form, furnished by the sovereign camp or beneficiary head camp, to the effect that he is in good health as a condition precedent to reinstatement, and waiving all rights thereto if his said written statement shall be found to be untrue. If the representations and statements made in said written statement be untrue, then said payments shall not cause his reinstatement." It will be borne in mind that Grandon was delinquent in the payment of four assessments and three instalments of monthly dues to his camp. On the afternoon of May 5, 1897, the daughter of Grandon called on Allen, the clerk of Alpha Camp, and paid him the amount of such delinquent dues and assessments. Allen informed her that one in default who did not appear in person to pay his dues must send his written statement, on the official form furnished by the sovereign camp, that

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he is in good health, as a condition precedent to his reinstatement, and waiving all rights thereto if his statement shall be found to be untrue. On the evening of the same day, Grandon signed a certificate as required, and the same was deposited in one of the mailing boxes in the city of Omaha, but was not received at the post-office until 11 A. M. of the 6th of May, and did not reach the hands of the clerk until some time in the afternoon of May 6th, and after the death of Grandon. Plaintiff in error insists that mailing the certificate was not sending it to the clerk of the camp, or that, if it was, it can not be considered as sent until it actually reached the clerk, and that reinstatement should date from the time the certificate reached the clerk, and not from the time of depositing it in the mail. The constitution provides that the certificate must be "sent," not that it shall be received, as a condition precedent to reinstatement.

Much of the ordinary business of the company, must, in the nature of things, have been transacted through the mail, and it is not unfair to presume that this provision of the constitution was intended for the benefit of members who resided at a distance from the camp, and who, as a matter of convenience, if not necessity, were compelled to use the mails instead of a messenger. There is nothing in the constitution stating in what manner this certificate shall be sent, and the clerk in this case directed that it should be sent by mail, and furnished a stamped envelope for that purpose. This is evidence of the construction put upon the constitution by the officers of the order, and we are agreed that the depositing of this certificate in the mail was a compliance with the rules of the order. This holding is supported by *Jackson v. Northwestern Mutual Relief Ass'n*, 47 N. W. Rep. [Wis.], 733.

On the trial of the case, the defendant below called Dr. Malster as a witness, and he testified that he was a physician, and that he had been called to attend Grandon in his last illness. He gave some evidence as to the time when called, and the number of calls made; but, because

of objections made by the plaintiff below, he was not allowed to testify as to Grandon's condition. The plaintiff below, as a part of her cross-examination, exhibits a written statement, signed by the doctor, in the following form: "Omaha, August 19, 1897. This is to certify that I treated T. Grandon in his last sickness, and that he was not dangerously sick until the night before he died." This statement she introduced in evidence as a part of the doctor's cross-examination. The company then sought to examine the doctor further, claiming that by the introduction of this statement the plaintiff had waived her privileges, and that it was entitled to show by the witness the condition of Grandon, and of what illness he was suffering. The court refused to allow this examination to be made, and this holding of the court is one of the errors assigned and argued. We do not know upon what theory the district court refused this examination, but it was probably upon the theory advanced by the plaintiff below in her brief here, and, that her position may be fully understood, we quote from the brief: "The plaintiff in error called Dr. Malster to show that he had treated Thomas Grandon. The only possible object of this testimony was to show, by inference, from the fact of treatment that Grandon was not in good health. The defendant in error then offered the doctor's written statement as cross-examination. There was no objection that it was not cross-examination. It was offered as such and received as such without objection. It was not offered as part of the plaintiff's case, and therefore no waiver can be inferred from it. If the defendant below could put the doctor on the stand and draw out testimony tending to show that Grandon was not in good health and the plaintiff could not then cross-examine so as to weaken that evidence without thereby waiving the privilege, the statutory privilege is of no avail." Our statute relating to witnesses and their competency contains the following provision relating to professional communications: "No practicing attorney, counsellor, physician, surgeon, minister of the gospel, or priest of any

denomination shall be allowed, in giving testimony, to disclose any confidential communication, properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline." Code of Civil Procedure, sec. 333. "The prohibitions in the preceding sections do not apply to cases where the party in whose favor the respective provisions are enacted waives the rights thereby conferred." Code of Civil Procedure, sec. 334. The rule in this state, as well as in other states having a like statute, is that the above sections protect a party against any disclosure by a physician made to him in the course of his professional employment, and necessary and proper to enable him to discharge his duty to his patient. Not only are such communications privileged, but whatever knowledge the physician may gain from observing his condition and symptoms is likewise privileged. There can be no doubt as to the rights of the patient in this respect, and the courts, in a proper case, are vigilant to see that these rights are fully protected. But the fact that a physician was called to attend a patient is not a privileged communication. The supreme court of Michigan, in construing a similar statute, said: "The fact that a doctor is the family physician of the insured, and the fact that he attended the insured professionally, and the dates and number of his visits, are each and all facts which are not within the prohibition of the statute, and to which the physician may be permitted to testify." *Briesenmeister v. Knights of Pythias*, 81 Mich., 525. In *Cooley v. Foltz*, 85 Mich., 47, we find the following statement: "Plaintiff introduced one physician known as an 'eclectic,' and who had never graduated at any regular school of medicine, who testified to her injuries. The defendant then introduced two physicians as witnesses who had been called to treat her both before and after the alleged trouble with the defendant. They obtained no knowledge of her ailments and condition except what they had obtained in their professional capacity. This testi-

mony was objected to as inadmissible under How. Stat., 7516. The objection was well taken, and the testimony should have been excluded. *Briesenmeister v. Supreme Lodge*, 81 Mich., 525, and authorities there cited. The entire subject is there fully discussed, rendering further mention here unnecessary. The defendant evidently recognizes the error, as he has filed no brief in this court. In the event of a new trial it is proper to say that it was competent for the defense to introduce these witnesses, and prove by them that they had been called by the plaintiff to examine and prescribe for her. The failure of the plaintiff to produce them as witnesses was a legitimate fact for the jury in determining the merits of the case." The plaintiff in error had a right to call Doctor Malster to show by him that he had waited upon Grandon in his professional capacity. No privilege was violated in so doing, and the defendant in error, by introducing the written statement of the doctor that Grandon was not seriously sick until the evening previous to his death, opened up the question of his condition, and thereby waived the privilege which the statute gave her. In *Morris v. Railway Co.*, 148 N. Y., 88, it is said in effect that statutory prohibition can not be used both as a shield and a sword. If a party to the suit of his own volition in any manner or form places before the jury the evidence of the physician as to what he observed or what was said to him, he can not longer object on the ground that the knowledge furnishing the basis of such confidence was obtained while treating the patient in a professional capacity. We have no doubt that it was error on the part of the court to refuse to allow the plaintiff in error to further examine the doctor as to the physical condition of Grandon at the time referred to in his written statement, and that this is of such materiality as to require a reversal of the case.

There is but one question requiring further consideration. An ordinance of the city of Omaha makes it the duty of every undertaker or other person, before removing any corpse for burial, to obtain from the secretary of the

board of health a permit to do so, and, before obtaining such permit, he shall deposit with said secretary a certificate setting forth, among other matters, the cause and date of death, and duration of last illness of deceased, which certificate shall be signed by the physician or surgeon in attendance at the time of death. In case no physician or surgeon attended the deceased, then the certificate must be made by some relative or attendant. It will be observed that it is only by implication that the ordinance above referred to requires the physician to make and sign the certificate contemplated by the ordinance. The certificate, when made, is not required to be under oath, and its purpose is evidently to assist the health department in the performance of the duties devolving upon that office. It is a mere police regulation, and is not intended for the purpose of supplying the public at large with information upon which reliance may be placed in the business affairs of the community. We do not think the record is of such character as to entitle it to be received in evidence, as affecting the interest of a party to a litigation. There is another reason, which, in our opinion, makes it incompetent. If signed by a physician, it contains matter relating to his patient which the physician is not allowed to disclose as a witness upon the trial against the objection of his patient or those representing him. That a record of this character, reciting privileged communications, may be used in evidence against a party where the testimony of the physician making it could not be received, is a proposition so inconsistent with reason and natural rules of justice that we can not give our consent thereto. The court properly refused to allow the certificate in evidence.

Because of the error of the court in refusing a further examination of Doctor Malster, we recommend a reversal of the judgment.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

REVERSED.

NOTE.—*Privileged Communications.—Physician and Patient.*—At common law, the protection accorded to professional communications was not extended to physicians and surgeons, Taylor, 481. In recognition of the necessity for a full confidence between physician and patient, the legislatures of the following states and territories have extended the privilege to communications between physician and patient: Arizona, Arkansas, California, Colorado, Idaho, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Utah, Washington, Wisconsin and Wyoming. The restrictive clause of the several states varies considerably. I believe that New York was the first state to pass such a law. The New York statute reads: "A person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity." Code of Civil Procedure, par. 834. The restrictive clause that physician or surgeon "shall not be allowed to disclose," etc., has been substantially copied by Iowa, Michigan, Pennsylvania and Nebraska. In Nebraska the physician and surgeon are placed in the same category with the attorney, minister and priest. Code of Civil Procedure, sec. 333. The New York statute will not protect communications of a confidential nature made to one not legally qualified to practice, even against the protest of his patient. *Wiel v. Cowles*, 45 Hun [N. Y.], 307. Hence one dealing with another purporting to be a physician and surgeon, is charged with knowledge of his disability. The several statutes of California, Colorado, Idaho, Minnesota, Nevada, North Dakota, Oregon, Utah and Washington, provide that the physician either *shall not* or *can not* be examined. The statute of Montana that he *shall not be a witness*. The statute of Ohio that he *shall not testify*; and this restriction has been copied by Wyoming. The statutes of Indiana, Kansas and Missouri provide that a physician shall not be competent to testify to information professionally obtained, and this provision has been substantially copied in Oklahoma. The statutes of Arkansas, North Carolina and Wisconsin provide the physician shall not be required, or compelled, to testify. Arkansas extends this protection to the "trained nurse," while North Carolina, by a proviso, leaves the matter in the hands of the presiding judge. The statutes of California, Idaho, Minnesota, Montana, Oregon, Pennsylvania, Utah and Washington expressly restrict the application to civil cases. The statutes of Kansas, Nebraska, Nevada, Ohio, Oklahoma and Wyoming provide that the patient may waive the privilege and allow the witness to testify. As the privilege by these statutes

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is for the benefit of the patient, it is not impossible that courts might hold, as they have held in regard to attorneys, that this, like any personal privilege, might be waived in the absence of a statute. The mere fact that one is a licensed physician, does not, *ipso facto*, confer the privilege. The confidential relation must exist at the time the information is obtained. *Jacobs v. Cross*, 19 Minn., 523. The relation must not be presumed; it must be proved. *People v. Schuyler*, 106 N. Y., 298, 12 N. E. Rep., 783. It is not necessary to the existence of the relation that the patient himself summon the physician; the legal effect is the same if he be summoned by the attending physician, by the friends of the patient or by strangers. *Renihan v. Dennin*, 103 N. Y., 573. Where the public prosecutor sends a physician to examine a person upon whom a crime has been committed, for the purpose of obtaining evidence, and he treats the sufferer, the relation attaches and the physician is disqualified as a witness. *People v. Murphy*, 101 N. Y., 126. The same is true of a physician sent on a like errand by the defendant, in a suit for personal injuries. *Weitz v. Mound City R. Co.*, 53 Mo. App., 39; *Freel v. Market Street R. Co.*, 97 Cal., 40. It is otherwise when he visits the patient only for the purpose of information. *Nesbit v. People*, 19 Colo., 441, 36 Pac. Rep., 221; *People v. Kemmler*, 119 N. Y., 580. (The latter is the celebrated electrocution case.) The information which a physician is forbidden to disclose, is not confined to communications made by the patient. But the restriction applies to all facts which necessarily come to a physician in a professional case. *People v. Stout*, 3 Parker's Rep. [N. Y.], 670. This question has never been passed upon by the supreme court of Nebraska. But in the eighth judicial district of this state, at the November, 1897, term of district court for Cedar county, Evans, J., presiding, the case of *Rawhouser v. Aukeny* (bastardy) was tried, when the defendant offered as a witness one Augustus Hamilton, who, after qualifying as a physician, and testifying that he had been consulted by the prosecutrix and had made an examination, was asked what was the result of the examination with reference to her being pregnant. The question was objected to as calling for the result of a professional consultation and examination. The objection was sustained. The ruling was not assigned as error on review before the supreme court. To the same effect is *Kelley v. Highfield*, 15 Ore., 277; and in Indiana whose statute, like our own, uses the word "communication," the supreme court "sets the seal of real secrecy and confidence upon what the physician observes in respect to the patient's person." *Williams v. Johnson*, 112 Ind., 273. There are certain communications outside professional privilege. *Collins v. Mack*, 31 Ark., 684. There is some disagreement amongst authorities as to whether a physician can testify with reference to his patient being drunk or sober. *Linz v. Massachusetts Mutual Life Ins. Co.*, 8 Mo. App., 363; *Kling v. City of Kansas*, 27 Mo. App., 231. The former case allows of the physician so testifying; the latter forbids him to so testify. The rule of exclusion applies to testamentary capacity. *Renihan v. Dennin*, 103 N. Y., 573. Communications for the purpose of doing an unlawful act or committing a crime are not privileged.

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People v. Lane, 101 Cal., 513, 36 Pac. Rep., 16; *State v. Kidd*, 89 Ia., 54; *State v. Smith*, 99 Ia., 26, 68 N. W. Rep., 428. A physician is not precluded from giving the number and dates of his professional visits. *Briesenmeister v. Knights of Pythias*, 81 Mich., 252; *Dittrich v. City of Detroit*, 98 Mich., 245, 57 N. W. Rep., 125. A physician took an unprofessional friend with him to attend a case of confinement. The doctor was sick and fatigued from overwork. The roads were so bad that a horse could neither be ridden nor driven over them. His non-professional friend reluctantly consented to go with him and assist in carrying the lantern, umbrella and obstetrical instruments. It was in midwinter. The house was 14x16 and had but one room. During the accouchement, the doctor's companion conducted himself with great propriety, sitting with his face to the wall; and only once when the patient, in a labor-pain, had kicked a female assistant in the pit of the stomach, was he called to assist. He held one of her hands, but returned to his former position when the agony was past. The doctor did not disclose the non-professional character of his companion. The woman recovered in an action on the case against both the doctor and his companion for "shame and mortification," by this violation of professional confidence. *De May v. Roberts*, 46 Mich., 160-166.—REPORTER.

ALBERT GULLION V. MARGARET TRAVER ET AL.

FILED FEBRUARY 19, 1902. No. 11,080.

Commissioner's opinion, Department No. 3.

1. **Motion for New Trial: AMENDMENT: UNAVOIDABLE DELAY.** A motion for a new trial can not be amended after the statutory time for filing such motion has expired, except upon a finding by the court that the party was unavoidably prevented from presenting the matter contained in the amendment within three days after verdict.
2. **Motion for New Trial: AMENDMENT: LIMITATION.** Questions presented by an amendment to a motion for a new trial, made more than three days after verdict and without a finding of the court that the party was unavoidably prevented from presenting such questions within three days from verdict, will not be considered by this court.
3. **Instruction: RULE OF DAMAGES.** The refusal to give an instruction correctly stating a rule of damages, but which became immaterial on account of the finding of the jury, is not reversible error.
4. **Verdict.** The verdict of a jury will not be disturbed when based on conflicting evidence.

ERROR from the district court for Cass county. Tried below before RAMSEY, J. *Affirmed.*

Mockett & Polk and *C. S. Polk*, for plaintiff in error.

David K. Barr and *Jesse L. Root*, *contra.*

DUFFIE, C.

This is an action in replevin brought by the plaintiff to recover certain personal property described in a chattel mortgage claimed to have been executed by the defendant in error, Margaret Traver, and George Traver, her husband. Charles P. Traver intervened in the action, claiming to be the owner of one cow described in the mortgage. The jury returned a verdict for the defendants and intervener, upon which judgment was entered by the court, and the plaintiff in error has brought the record to this court for review.

Some preliminary questions should be disposed of before proceeding to examine the case upon its merits. The verdict of the jury was returned and filed November 28, 1898, and the plaintiff in error filed his motion for a new trial December 1, 1898. December 10, 1898, the court made an order granting leave to the plaintiff to amend his motion for a new trial. The record does not disclose any written application made to the court for leave to amend the motion, nor does it appear upon what ground such leave was granted, or that any showing was made or required as a basis for the order. In *Aultman, Miller & Co. v. Leahy*, 24 Nebr., 286, the plaintiff, after the expiration of the three days allowed by the statute for filing a motion for a new trial, applied to the court, and obtained leave to amend his motion. This court refused to consider the matters set out in the amendment, and relating to the power of the court in such cases said: "Section 316 of the Code of Civil Procedure provides that 'the application for a new trial must be made at the term the verdict is rendered, and, except for the cause of newly discovered evi-

dence, shall be within three days after the verdict was rendered, unless unavoidably prevented.' This amendment embodies a new and definite assignment of error. It was not made until the fourth day after the verdict was rendered, after the expiration of the time limited by the Code, without the finding by the court that the plaintiff 'was unavoidably prevented' from a compliance with the statute, as a palliation for the amendment. Is it not, therefore, to be rejected? If it may be said that the application was made within the statutory limit, and that the right of amendment to pleadings is inherent in the court, rendering this amendment consubstantial with the original assignments, it may also be suggested that the amendment was an apparent necessity in bringing the application within the rule that, 'the [attention of] the trial court be specifically called to each alleged error, in a motion for a new trial, and the same be also specifically pointed out to the supreme court in the petition in error,' and without which the original allegations were too incomplete and insufficient to support the vague contentions of error presented to the court. The amendment comprised substantially the whole of error assigned. It does not seem, therefore, to have been competent for the court to have extended the time limited by the Code, by the allowance of a substitute, as an amendment, after the expiration of the three days appointed, after the verdict. The authority of the legislature to regulate, by the Code, applications for new trials, will not be disputed. It has done so in a mandatory provision. This amendment is no less than an infraction of it. It is an improper suspension of the rule of the Code."

In the motion first filed no exceptions were taken to the instructions of the court, the only error alleged relating to instructions being that the court erred in refusing to give instruction No. 1, asked by the plaintiff. Following the rule announced in *Aultman, Miller & Co. v. Leahey*, we can not consider the errors assigned in the amended motion filed for a new trial attacking the correctness of

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the instructions given by the court to the jury. The refusal of the court to instruct the jury as requested by the plaintiff in instruction No. 1 is not reversible error, unless from an examination of the evidence it shall appear that the verdict of the jury is not supported by sufficient evidence. The instruction related wholly to the damages which the plaintiff should recover for part of the mortgaged property which the defendant had sold and disposed of, provided the jury found for the plaintiff. As the jury returned a verdict for the defendants this became wholly immaterial, and the failure to give the instruction could not in any manner prejudice the plaintiff.

It appears from the record before us that the defendant George Traver was indebted to one Cutler. This indebtedness was evidenced by a note which had been indorsed by Cutler to Gullion, the plaintiff in error. On the evening of January 8, 1896, Cutler and Quackenbush, a bookkeeper for the First National Bank of Greenwood, drove out to the Travers farm to obtain security upon the note. A real-estate mortgage securing the note was made and executed at that time. Further security being demanded, the chattel mortgage in question in this case was signed by Mrs. and Mr. Traver, and given to Quackenbush, with instructions to fill in a description of the property intended to be covered thereby from a first mortgage then held upon the same property by the First National Bank of Greenwood. It is claimed by the defendants that Quackenbush was to hold the mortgage until the Travers could get to town and examine the mortgage and the description of property contained therein. It is asserted, and not denied, that a portion of the property included in the chattel mortgage held by the First National Bank of Greenwood had been sold, and the proceeds applied upon that mortgage, and for this reason the Travers insist that they desired to examine the mortgage before its delivery, to be certain that it did not cover any property not then owned by them. Mr. Traver was sick at the time, and the evidence is practically undisputed that he did not get to town

until the 19th of January, 1896. In the meantime, Quack-enbush had filled in the mortgage with a description of the property, and on the 13th of January, 1896, had filed a copy of the same with the register of deeds of Cass county. The issue was sharply made that there never had been any delivery of this mortgage by Traver and his wife.

There is ample evidence in the record to support the finding of the jury that no delivery was in fact ever made. In this condition of the case, we can not, under the well-known rule of the court, interfere with the findings of the jury. We therefore recommend the affirmance of the judgment.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ANNIE H. CHAPPLE V. SOVEREIGN CAMP OF WOODMEN OF
THE WORLD.

FILED FEBRUARY 19, 1902. No. 10,716.

Commissioner's opinion, Department No. 3.

1. **Life Insurance: ASSESSMENT: LIABILITY: NOTICE: BY-LAW: FORFEITURE FOR NON-PAYMENT.** Although a by-law of a beneficiary life insurance association requires the clerk of the local body of the order to notify the members of their liability for assessments, his failure so to do will not prevent a forfeiture for non-payment if another by-law expressly provides that such failure shall have that effect.
2. **Assessment: SUBSTANTIAL COMPLIANCE WITH BY-LAW.** Substantial compliance with a by-law of such association, empowering two designated officers of the society to make an assessment on a certain day in each calendar month, and requiring the clerk of a superior branch of the order to immediately give notice of the making of same to the clerks of inferior associations, will be sufficient to uphold the assessment.
3. ———: **ABSTRACT EQUITY.** An assessment for the precise purpose specified in the by-laws of such an association will not be treated

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as invalid solely because it may not appear to be abstractly equitable.

4. **Forfeiture of Membership: FACT OF DELINQUENCY ITSELF.** When the by-laws of such an association expressly declare that the fact of delinquency in payment of an assessment shall work a forfeiture of membership, and that thereafter the delinquent shall not be "entitled to receive the password, or to participate in any of the business or social proceedings of his camp, he may be admitted to a meeting to pay his arrearages, but must retire if he does not pay same," such forfeiture is not waived by the mere fact that the member "was present at all the meetings and participated in all the social proceedings of said camp, up and to the time of his death," which occurred soon after he had become delinquent.

ERROR from the district court for Douglas county.
Tried below before DICKINSON, J. *Affirmed*

Nelson C. Pratt, for plaintiff in error.

Brome & Burnett, contra.

AMES, C.

On or about the 21st day of February, 1895, William H. Chapple, husband of the plaintiff in error, became a member of the defendant association, and of Alpha Camp No. 1, thereof, situated at Omaha, in this state. At the time he received a certificate of membership, providing, in effect, that, if he should die while in good standing as a member, his wife, the plaintiff, should be entitled to participate in the mortuary fund of the association, to the amount of \$2,000. This certificate expressly bound the member to whom it was issued, by all the by-laws, rules and regulations of the defendant, and at the time of its issuance the former complied with all the requirements of the society, requisite to make him a member of the same in good standing, and he became such member. Among the objects and powers of the association specified in its by-laws is the creating of "a fund from which, upon reasonable and satisfactory proofs of the death of a member, who has complied with the lawful requirements of the order, there shall be paid a sum not exceeding \$3,000, to" his beneficiary.

One of the regulations of the order is that on the 20th day of each month two designated officers of the association "shall determine the number of assessments, if any, necessary to provide for the payment of deaths which may be registered for payment, during the ensuing month, and the sovereign clerk shall immediately mail notice thereof to each camp," whereupon the clerk of the local camp is required to remit the contents of the beneficiary fund to the sovereign clerk. The money thus remitted is required to be used, so far as necessary, for the payment of death losses.

It will be seen from the foregoing that it is not intended that assessments shall be levied for the payment of past or current death losses, but are anticipatory in their nature, and designed to maintain a fund out of which losses shall be paid as they shall be incurred. This fact is mentioned here because we think that it disposes of one of the objections of the plaintiff in error, which is that the assessments, or part of them, in the payment of which Chapple is alleged to be delinquent, were not for the payment of losses occasioned by the deaths of members occurring during his membership. One of the by-laws provides that "the liability of a member to contribute to the payment of death losses shall commence with the date at which his certificate was issued by the sovereign clerk." The first assessment for which it is claimed that Chapple was liable and delinquent was made on or about April 20, which was two months after he became a member. So far as this feature of the matter is concerned, his liability therefor was consequently within the very letter of his contract. In this particular respect, the case is substantially identical with that of *Fulton v. Stevens*, 74 N. W. Rep. [Wis.], 803, and the same rule applies with equal force to the succeeding assessments involved in this litigation.

It is further objected that the first assessment was invalid because of not having been made at the time or in the manner required by the above-mentioned by-law. The two officers who were empowered to make it do not appear

to have been intended to constitute a board or tribunal, but the authority to do this act was lodged in them as individuals, and they were not required to keep or make any record of their action in the premises. One of these officers testified that he was unable to say, positively, whether the assessment was made on the 19th, 20th, or 21st of the month, and it is not certain whether at the time it was made the two men were together; but the witnesses testified that it was their custom always to confer with each other, either by word of mouth, or by letter, telephone or telegram, and that the assessments were made as results of such conferences, and were joint acts of both. We think that the regulation relative to making the assessments is so far directory that a substantial compliance therewith will suffice, and that there was such compliance in this instance. A very similar question was before the supreme court of Minnesota in *Mee v. Bankers' Life Ass'n* (69 Minn., 210, 212), and was disposed of in the following manner: "The first point made by plaintiff's counsel is that the so-called December assessment was invalid for two distinct reasons: (a) Because all steps looking toward the assessment were taken prior to a time specifically prescribed by the by-laws; (b) because no complete assessment was made by the board of trustees or by its resolution, what was relied on being largely the acts of the secretary or of some clerk under his direction. We do not think it worth while to discuss this point at length. It stood admitted that ten death losses had actually occurred when on November 6, 1893, an assessment being necessary and obligatory upon the association, the board of trustees, by resolution, made and levied the regular December assessment upon all members, to be collected according to the articles of the association. From that time on until the last day of November the secretary and one or more clerks were engaged in preparing, causing to be printed, and in getting ready for mailing the necessary notices of assessment or mortuary calls for over 12,000 members. These notices were dated December 1, and

mailed on the last day of November. The articles provided that all assessments for the payment of death losses should be made by resolution of the board of trustees, and a by-law had been adopted, which read 'until and unless otherwise ordered by the board of trustees, mortuary assessments' shall be made only on the first secular days of April, July, and December in each year, and by special resolution. Although the resolution in question was adopted November 6, it was expressly made for the December assessment. It was necessary for the resolution to be made and adopted prior to the first secular day in December, long enough before, at least, to prepare the notices for mailing, and this is what was done. That the secretary and his clerks performed a large amount of clerical work incident upon the adoption of the resolution is of no consequence whatsoever. The articles and the by-laws were substantially complied with, and the assessment regularly and properly made."

The same principles apply to the notification by the clerk of the sovereign camp to the clerk of the local camp of the fact of such assessments. He is required to make such notification "immediately" by mail. The notices in the case at bar were not sent until the first of the month following that in which they were made. This was pursuant to a custom adopted for the convenience of the person sending them, and does not appear to have been the cause of any loss or inconvenience to anybody else. So slight a variance from a prescribed rule by a mere clerical officer ought not to be held to defeat a previously valid assessment. Concerning the collection of assessments after notice thereof has been received by the clerk of the local camp, there are the following provisions in the by-laws of the association, to which we have given our own numbers: 1. "Every member shall be notified by the clerk whenever an assessment is ordered to be levied, before the 10th day of every calendar month, unless the official notice is ordered, by the sovereign executive council, to be published in an official organ." 2. "Clerks shall notify members of

assessments and dues by sending a notice, by mail, to his last known address, or by leaving it at his usual place of residence or business on or before the 10th day of each month when a payment is to be made." 3. "The failure of the clerk to notify a member of assessments, shall not relieve a member from the payment of assessments or dues, according to the call or requirements of the sovereign camp, and he shall stand suspended for non-payment of same as if he had received actual notice. And it shall be the duty of every member who may not receive a notice from the clerk of the camp for the payment of assessments or dues to inquire of the clerk of the camp, on or before the last day of each month, whether any calls for assessments or dues have been made or liability incurred against him, and if any, he shall pay the same according to the call of the sovereign camp, and by-laws of the camp or vote of same, and upon a failure to do so, shall stand suspended." Undoubtedly all these rules, having relation to the same matter, are to be construed together, and language could hardly be more explicit for rendering the giving of notice merely directory and non-essential than is that of the last of them. It is not contended that Chapple was ignorant of these regulations, or that he was imposed upon or misled in any way with respect to any matter treated of by them; and it would be a waste of time to discuss the evidence as to whether the clerk did notify him, or attempt to do so, or whether, if he sent a notice by mail, it was properly addressed. We think, however, that there is sufficient evidence to uphold a finding that the clerk of the local camp gave the required notices. Another by-law enacts: 4. "On or before the last day of each month each member shall pay the assessments and dues, if any, which may have been levied for the month. A member failing to pay any assessment or dues within the time required by law, shall stand suspended, and shall not thereafter be entitled to any of the benefits of the order, and his certificate shall be canceled and void, and he can not attend any meetings of his camp until he has been duly reinstated in ac-

cordance with the laws of the order." Chapple died on the 9th of June, delinquent of three successive assessments, and his widow, the plaintiff in error, and the beneficiary named in his membership certificate, brought this action to recover thereon. The answer pleaded substantially the foregoing facts, and, as an avoidance of them, the reply contained the following matter, which was upon motion stricken out: "He is not entitled to receive the password or to participate in any of the business or social proceedings of his camp. He may be admitted to a meeting to pay his arrearages, but must retire if he does not pay same. That the said W. H. Chapple was present at all the meetings, and participated in all the social proceedings of said camp, up and to the time of his death." The plaintiff in error contends that the order striking this matter from the reply is erroneous, for the following reasons, as stated in his brief: "The contention of plaintiff in error is that, by the defendant in error permitting W. H. Chapple to attend the meetings of said order, that it thereby waived the payment of the assessments, which assessments were due and unpaid as claimed by the defendant in error, and, granting that such assessments were not paid, that they, by reason of the waiver in permitting the said W. H. Chapple to attend the meetings, he still was in good standing, and his beneficiary entitled to all the rights and privileges under the certificate issued by the defendant in error." In support of this contention the plaintiff in error cites several authorities in which it is held that the clerk of the local camp, who is entrusted with the duty of collecting the assessments, is for that purpose the agent of the superior branch or body of the society for which the service is performed, and that if, in so doing, he adopts a course of business or conduct, upon the sufficiency and propriety of which the members, in good faith, rely, and to which they conform, they or their beneficiaries will not be deprived of the rights and benefits of membership, because of the fact that the course pursued is in violation of the known rules of the order. With the principles of those

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decisions we are fully in accord, but they do not seem to us to be applicable to the question at issue in this case. It was the clerk of the local camp, not the camp itself, that was the agent in the premises. No action by the camp was required to suspend the deceased from the right to attend its meetings and participate in its social proceedings. He lost that right instantly by the reason of the fact of delinquency. The failure of the members to resent his intrusion into their meetings, or their forbearance to eject him therefrom and to forbid him to participate with them socially, wrought him no injury, and had no tendency to mislead him. No affirmative act is alleged to have been done either by the clerk or by the camp which had a tendency toward that result. A jury was waived, and the cause tried to the court, who found generally for the defendant, and rendered a judgment of dismissal and for costs. We think he did not err, and it is recommended that the judgment be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment be

AFFIRMED.

RUTH BROWN ET AL. V. CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY.*

FILED FEBRUARY 19, 1902. No. 11,121.

Commissioner's opinion, Department No. 3.

1. **Railroad Right of Way: DEPOSIT WITH COUNTY JUDGE: LIABILITY OF COMPANY.** The deposit of money by a railway company with a county judge, during the progress of proceedings to obtain a right of way, does not, unless it is withdrawn by the property owner, discharge the obligation of the company to make just compensation for the property taken or damaged.
2. ———: ———: ———. One whose property has been taken by a railway company for a right of way by statutory proceedings for that purpose may, after the proceedings have terminated, recover the amount awarded to him by an action at law against

*Rehearing allowed. Reversal adhered to.

the company, and he is not bound to resort to the fund deposited with the county judge during the proceedings, as required by statute.

3. ———: ———: ———: REPUDIATION: ESTOPPEL. A railway company, after having prosecuted proceedings to obtain a right of way to a final determination, is estopped to repudiate or abandon them, and is bound to pay the amount of the award to the landowner.

ERROR from the district court for Lancaster county. Tried below before TUTTLE, J. *Reversed.*

Benjamin F. Johnson, for plaintiffs in error.

W. F. Evans and Billingsley & Greene, *contra.*

AMES, C.

In 1892 the defendant in error began proceedings in the county court for Lancaster county for the acquisition, in the usual manner, of a right of way for railroad purposes over and upon certain lots in the city of Lincoln, a part of which were owned by the plaintiffs in error, and a part by one Westerfield. Commissioners appointed for the purpose assessed the total damages to these lots at \$1,600, and this amount of money was thereupon deposited by the company with the county judge. Upon an appeal to the district court this award was for some reason set aside; and afterwards, under a new commission issuing from the county court, damages were assessed at \$950. The property owners and the company then agreed to refrain from the further prosecution of the proceedings, and in consideration thereof it was stipulated that the compensation to be paid to the former should be \$1,200, or, as the pleadings phrase it, the award should be increased to that sum, one-half thereof to be paid to Westerfield and the other half to the plaintiffs in error. The money deposited by the company at the time of the first appraisalment was permitted by it to be retained by the county judge and was directed by it to be applied, so far as requisite, to the satisfaction of such claims for damages as should finally be established in the behalf of the property owners. Soon

after the making of the agreement, Westerfield was, with the consent of the company, permitted to withdraw \$600 from the fund; but it was further stipulated between the latter and the plaintiffs in error that their part of the sum agreed upon should not be withdrawn until they should convey to the company, by sufficient warranty deeds, the fee title to that part of the lots belonging to them. It is alleged by the company and denied by the plaintiffs in error that it was an expressed part of the agreement that the property owners should look to the funds in the hands of the county judge for their money, but none of the stipulations is in writing and there is no evidence upon the point in the record. With this exception, however, there is no dispute as to what occurred between the parties, and we think the fair interpretation of the pleadings and circumstances is that both of them understood that the amount of the award, \$950, and an additional \$250, making a total of \$1,200, should remain in the hands of the judge in the character of a statutory deposit, until withdrawn by the parties entitled to it by the terms of the compromise. Westerfield, as already noted, withdrew his money speedily, but there was some delay on the part of the plaintiffs in error because there was some difficulty about their title which needed to be settled by a decree of court before they could make satisfactory deeds of warranty conveying their land. This difficulty was finally overcome, and the required deeds were executed and delivered; and a demand was made upon the company to pay \$600 to the plaintiffs in error in consideration of the premises. Payment was refused, and this action was brought to recover the sum demanded. It is admitted that neither party has withdrawn the money from the county judge or his successor in office, or made any attempt or request to do so. The trial judge was of the opinion that upon this state of facts the plaintiffs were not entitled to recover, and instructed the jury to return a verdict for the defendant, and thus is presented the only question in the case.

We are of the opinion that the district court erred. The constitution of this state provides, section 21, article 1: "The property of no person shall be taken or damaged for public use without just compensation therefor." The language of this section is imperative, and the right of the property owners to compensation is unqualified. This right can not be impaired or modified by legislation or otherwise. He is not compensated until the sum to which he is entitled is paid or tendered to him or to some one authorized by him to receive it. It is not competent for either the legislature or the courts to appoint some person without his consent, and to say that payment or deposit with such appointee shall be equivalent to payment to him. If the statute expressly so provided, or was susceptible of that construction, it would be unconstitutional and void. In our opinion such is not its meaning, although it goes to the furthest limit permissible. The money, after the assessment has been made, is deposited with the county judge, not as payment, but as security that payment shall be made; and no act of the railway company, or of the court, or of any other person except the property owner, can convert it into a payment, or relieve the corporation of its obligation, not to secure, but actually to make, just compensation for the property taken or damaged. The property owner may, if he chooses, waive his privilege, and apply for and receive the sum awarded and deposited, and by so doing he, of course, relieves both the company and the judge of all further or other responsibility; but he may also, if he prefers, stand upon his constitutional right and demand that the sum awarded be paid to him, or to an agent of his own choosing. Neither during the pendency of the proceedings nor after they have ended can he be compelled to resort for the satisfaction of his demands to the uncertain security of official responsibility, nor to incur the risk of official delinquency. He can not be charged with the negligence or shortcomings of an agent in whose appointment he did not concur, nor can he be accused of

negligence because of failure to demand of a third person a sum of money which his adversary is under obligation to pay himself. The proceeding is instituted at the instance and for the benefit of the railway company, and the deposit is permitted to be made solely for its convenience. Having made it, the company obtains a license to enter upon the land, but does not accomplish a taking of the property, or acquire an easement therein, until it has satisfied the constitutional requirement and made compensation therefor to the person owning the same. Commenting upon similar constitutional and statutory enactments, the supreme court of Iowa, in *White v. Wabash, St. L. & P. R. Co.*, 64 Ia., 281, 20 N. W. Rep., 436, say: "These provisions are in harmony with the constitution. The payment of the money to the sheriff can not be regarded as a payment to the landowner. Section 1244 provides that the amount of damages shall be paid to the sheriff 'for the use' of the owner of the land. This evidently means nothing more than that it shall be paid by the sheriff at the proper time to the owner. The sheriff can not be regarded as the agent of the owner, but rather as the agent of the railway company, which invoked his services by instituting the proceedings. The money can not be regarded as having been paid into court, and therefore in the custody of the law. But, if this be not so, the payment to the sheriff is not payment to the landowners. If, through the unfaithfulness or mistake of the sheriff, or the failure to pursue the directions of the statute, the money should be lost, and not reach the hands of the landowner, the loss ought not to fall upon him, but rather upon the railway company, which was the mover in the proceedings, and received the benefits flowing from them. *Blackshire v. Atchison, T. & S. F. R. Co.*, 13 Kan., 514."

There is evidence in the record that the county judge with whom the deposit was made failed to account for the money or to pay it over to his successor in office, and, continuing in default, had departed from the state; but we

have omitted to comment upon this fact, because, in our opinion, it is immaterial. The undisputed facts are that at about the time of the making of the award the defendant entered into possession of the property, and has since enjoyed an easement in it for railroad purposes, and that the plaintiffs in error have not been compensated therefor. But actual possession by the railway company is not essential to the plaintiff's right of recovery. The former, after having prosecuted the proceedings to a final determination, is estopped to repudiate or abandon them and is bound to pay the amount of the award to the landowner. *Drath v. Burlington & M. R. R. Co.*, 15 Nebr., 367. Upon that state of facts, the plaintiffs, not the defendant, were entitled to recover, and the instruction complained of was erroneous.

It is recommended that the judgment of the district court be reversed and a new trial granted.

DUFFIE and ALBERT, CC., concur.

By the Court: For reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed, and a new trial granted.

REVERSED AND REMANDED.

OSCAR HOLWAY V. AMERICAN EXCHANGE NATIONAL BANK
OF LINCOLN.

FILED FEBRUARY 19, 1902. No. 10,968.

Commissioner's opinion, Department No. 3.

1. **General Demurrer.** A general demurrer does not raise the question whether there is a defect of parties.
2. **Special Demurrer: ORDER.** An order overruling a special demurrer will not be reviewed where no exception to such order is saved.
3. **Order of Attachment: AMENDED PETITION: ANOTHER CAUSE OF ACTION: DISMISSAL.** Where an order of attachment issues in an action, and property is levied upon thereunder, and an amended

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petition is subsequently filed, which, in addition to the cause of action stated in the original petition, sets forth another and different cause of action, and the first cause of action is dismissed before trial, the attachment is thereby dissolved, and an order for the sale of the attached property, in satisfaction of the judgment rendered on the second cause of action, is erroneous.

ERROR from the district court for Custer county. Tried below before GRIMES, J. *Affirmed in part.*

Holcomb Bros. and C. L. Gutterson, for plaintiff in error.

Sawyer & Snell, Kirkpatrick & Hager and Cameron & Reese, contra.

ALBERT, C.

The relief sought by the original petition filed in this case was to subject the individual property of the defendant to the payment of a certain judgment rendered in favor of the plaintiff and against W. Holway & Co., a co-partnership, of which, it was alleged, the defendant in this case was a member. A writ of attachment issued, under which certain real estate of the defendant was attached. Thereafter, the plaintiff filed an amended petition, which, in addition to the cause of action set forth in its original petition, set forth a second cause of action on certain promissory notes, executed by W. Holway & Co. and W. Holway to the Bank of Callaway and by it indorsed and delivered to the plaintiff. A demurrer to the amended petition was interposed on the ground, among others, that there was a defect of parties. The demurrer was sustained as to the first cause of action for some reason, and overruled as to the second. No exception was taken by the defendant to the order overruling the demurrer. Afterward, for some reason not clear to us, the court made an order requiring the plaintiff to elect upon which cause of action it would stand; in pursuance of which order, the plaintiff elected to stand on the second cause of action. No exception was taken by the defendant

to this order, nor to the election of the plaintiff made in pursuance of it. The issues were made up and submitted to the court without a jury. The court found in favor of the plaintiff and rendered judgment for the amount claimed, and ordered a sale of the attached property for the satisfaction of the judgment. The defendant brings the case here on error. We will refer to the parties by the title in the district court.

It is first urged that the court erred in overruling defendant's objection to the introduction of any testimony in support of the second cause of action set forth in the petition, for the reason that the facts therein stated are not sufficient to constitute a cause of action. The petition sufficiently shows that the notes were executed and delivered by W. Holway & Co. and W. Holway to the Bank of Callaway; that W. Holway & Co. was a copartnership; that the defendant in this case was a member of such copartnership; that the notes are past due and unpaid; the indorsement and transfer of the notes to the plaintiff; the amount due and owing thereon, from the defendant to the plaintiff; that being true a cause of action against the defendant is stated. In this behalf, however, it is urged that if the defendant is liable at all, it was jointly with his copartner. Whatever merit there may be in this objection, it is one that can not be successfully raised by a general demurrer. At common law, the non-joinder of parties was available only by plea in abatement. Under the Code, it renders a petition vulnerable to a special demurrer. Defendant's demurrer, interposed before answer, on the ground of a defect of parties, properly presented the question. The demurrer was overruled, and no exception taken. From this record we must infer that the ruling, at the time, was acquiesced in by the defendant. If so, it can not be urged as a ground for reversal in this court.

Considerable space is given in the brief to a discussion of the statutory provisions for actions against copartnerships. Such discussion is wholly foreign to this case.

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This is not an action against a partnership, but against an individual member. The right to maintain an action against a partnership, as such, is a statutory innovation. The right to maintain an action against the individual members of a firm on a partnership obligation has never, so far as we know, been questioned. Formerly it was the only method to enforce a partnership liability at law.

Complaint is made that the evidence in this case was taken at the time when one judge presided, whereas the case was submitted and judgment rendered when a different judge occupied the bench. We find in the record a stipulation whereby the cause was submitted on the evidence taken when the former judge presided. Parties will not be heard to complain of a procedure adopted at their request, or with their consent.

The defendant insists that the finding of the trial court that the defendant was a member of the firm of W. Holway & Co., and that the notes in suit are a partnership liability, is not sustained by sufficient evidence. The evidence upon this point is quite voluminous. To set it out at length would amount to a reproduction of a large portion of the bill of exceptions. Hence we shall content ourselves with stating that one witness testifies unequivocally that he himself was a member of the firm, and that the defendant was also a member of the firm of W. Holway & Co. Other witnesses testify to the fact that the other partner of the firm introduced the defendant to them, respectively, as his partner. Another witness testifies that the defendant stated to them that he was a member of the firm. In the face of such evidence on that issue, it can not truthfully be said that the finding of the court thereon is not sustained by sufficient evidence. That the notes were given for partnership debts, while not so clearly established as the defendant's relation to the firm, is amply sustained by the evidence. It is said in this connection that a part of the evidence in respect to these issues is incompetent. That may be. But it is a well-settled rule of this court that, where an action is tried to the court without a jury and

there is sufficient competent evidence in the record to sustain the findings, the judgment will not be reversed on account of the admission of incompetent evidence. The presumption of law is that such evidence was not considered by the court.

Another ground of complaint is that there is a variance between the allegations of the petition and the proof, in this: that it is alleged in the petition that the plaintiff is the owner and holder of the notes, whereas it develops in the testimony that the notes were indorsed and delivered to the plaintiff as collateral security for an indebtedness. That does not constitute a variance. On the state of facts shown in evidence, the plaintiff was the legal holder and owner of the notes. The plaintiff was the only one authorized to maintain an action for the recovery of the amount due on the notes. *Johnson v. Chilson*, 29 Nebr., 301.

It will be remembered that the order of attachment in this case issued on the original petition; that an amended petition was subsequently filed, setting up the cause of action set forth in the original petition, and a second cause of action, based on another state of facts; that the plaintiff elected to stand on the second cause of action, whereby the first cause of action was, in effect, dismissed. Complaint is now made that the court ordered a sale of the attached property for the payment of the amount found due, on the second cause of action. We think this complaint is well founded. By the dismissal of the first cause of action, which was the basis of the order of attachment, the attachment proceedings, being merely ancillary thereto, followed it. From that time on, the court had no jurisdiction over the attached property. The order directing a sale of the attached property is erroneous.

We recommend that the judgment of the district court against the defendant be affirmed, and that the order directing the sale of the attached property be reversed, and the cause remanded, with directions to the trial court to vacate and set aside the order directing such sale.

DUFFIE and AMES, CC., concur.

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By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court against the defendant is affirmed, and the order directing the sale of the attached property is reversed, and the cause remanded with directions to the trial court to vacate and set aside the order directing such sale.

JUDGMENT ACCORDINGLY.

J. L. MOORE, TRUSTEE, APPELLEE, v. FRANCIS M. JACOBS,
APPELLANT.

FILED MARCH 5, 1902. No. 11,368.

Confirmation: APPEAL.

APPEAL from the district court for Custer county.
Heard below before GRIMES, J. *Affirmed.*

J. R. Dean and J. S. Kirkpatrick, for appellant.

S. B. Pound, Roscoe Pound and C. L. Gutterson, contra.

PER CURIAM.

An appeal is taken by the owner of the fee title from a final order of confirmation of sale of real estate in foreclosure proceedings. None of the objections presented to the trial court as reasons why confirmation should be denied, except one, are presented or argued in brief of counsel for appellant; hence such objections are to be taken and considered as having been waived. The objections argued in the brief, save one relating to the return of the sheriff to the order of sale, which is apparently without merit, were in nowise presented to the trial court, and therefore we can not consider them on this appeal.

The order of confirmation should be, and accordingly is,

AFFIRMED.

HENRY HAINES, APPELLEE, v. DANIEL L. BELLINGER, IM-
PLEADED WITH WILLIAM H. GRASSMEYER, APPELLANT.

FILED MARCH 5, 1902. No. 11,391.

Confirmation: APPEAL.

APPEAL from the district court for Buffalo county.
Heard below before SULLIVAN, J. *Affirmed.*

B. O. Hostetler, for appellant.

William Gaslin, contra.

PER CURIAM.

Defendants, being the owners of the fee, appeal from an order of confirmation of sale entered in proceedings brought for the purpose of foreclosing a real estate mortgage. The questions presented for consideration by the appeal have in the main been passed upon and disposed of in the case of *Iowa Loan & Trust Co. v. Estate of Devall*, 63 Nebr., 826. Objection is made to the sufficiency of the affidavit of publication of the notice of sale. The objection is not well taken. The affidavit, as well as the sheriff's return, is sufficient evidence of publication of the notice as required by section 497 of the Code of Civil Procedure. *Nebraska Land, Stock-Growing & Investment Co. v. McKinley-Lanning Loan & Trust Co.*, 52 Nebr., 410. Objection is also made because in making the appraisement of the land, the same being a quarter section, the appraisers valued the entire tract, without taking into account a railroad right of way across the land and one acre deeded for church purposes. Conceding such to be the case, the appellants are in nowise prejudiced, and none others are complaining. On the authority of the cases cited, and for the reasons stated, the order appealed from should be, and accordingly is,

AFFIRMED.

SARAH JARVIS V. COUNTY OF CHASE.

FILED MARCH 5, 1902. No. 11,205.

1. **Notice of Appeal.** A notice of appeal, addressed to the county clerk, is served, within the meaning of section 37, chapter 18, article 1, Compiled Statutes, 1901, when it is delivered to such clerk.
2. ———: **DELIVERY: FILING.** The fact that such a notice was delivered to the clerk is a necessary inference from a statement in the record that it was filed with him by the appellant.

ERROR from the district court for Chase county. Tried below before NORRIS, J. *Reversed.*

Charles W. Meeker, for plaintiff in error.

P. W. Scott, *contra.*

SULLIVAN, C. J.

This proceeding in error brings up for review a decision of the district court dismissing an appeal taken by Sarah A. Jarvis from an order of the county board of Chase county disallowing a claim to recover back money paid for a tax-sale certificate covering real estate not subject to taxation. The question to be decided is whether the notice of appeal, which is conceded to be jurisdictional, was properly served. The statute provides (Compiled Statutes, 1901, ch. 18, art. 1, sec. 37) that when a claim of any person against a county is disallowed, in whole or in part, the claimant may appeal from the decision of the board to the district court, by causing a written notice to be served on the county clerk within twenty days from the date of the decision, and by executing a bond to the county, conditioned for the faithful prosecution of the appeal and the payment of costs. It also provides (sec. 39) that the clerk, upon such appeal being taken, shall make out and deliver to the clerk of the district court a transcript of the proceedings before the county board, and that the appeal

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shall then be entered, tried and determined as are appeals from justices of the peace. It appears from the record before us that the notice of appeal was filed by Jarvis with the county clerk, but it is contended that this did not constitute due service. Notwithstanding the decisions cited by the county attorney, we think it did. The statute requiring notice to be served upon the clerk, must, of course, be substantially complied with; but, since the sole object of the appeal is to enable parties to obtain justice, we see no reason for judging harshly or condemning for trivial faults, the proceeding by which it is sought to transfer the cause to the appellate court. The notice here in question was addressed to the county clerk, and it is entirely certain that it was delivered to him, for he states in the transcript filed in the district court that he filed it and copied it within twenty days after the county board rendered the decision. The notice having been delivered to the county clerk within the time limited by the statute, and the appeal bond having been given and approved, the district court, when the transcript was filed, had jurisdiction of the case, and should have proceeded to a trial on the merits. Rigid interpretation and judicial refinement were carried too far when the court held that the county clerk could receive, file and copy the notice, without being served with it. Delivery was service, and the fact of delivery is a necessary inference from the recitals of the transcript. The supreme court of Minnesota, in *State v. Klitzke*, 46 Minn., 343, went so far as to hold that a notice of appeal addressed to the attorney for the appellee was served upon the clerk of the district court when it was filed in his office. This decision, doubtless, runs counter to the current of authority, but it illustrates the repugnance of courts to listen to mere captious criticism upon the steps taken by a defeated litigant in an effort to obtain a proper adjudication of his rights. The decision of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

Farmers & Merchants' State Bank v. Thornburg.

FARMERS & MERCHANTS' STATE BANK OF BEATRICE, AP-
PELLEE, V. JAMES THORNBURG ET AL., APPELLANTS.

FILED MARCH 5, 1902. No. 11,228.

Judicial Sale: APPRAISEMENT. After land has been sold in execution of a decree of foreclosure it is too late to question the appraisement, except in case of fraud.

APPEAL from the district court for Gage county. Heard below before LETTON, J. *Affirmed.*

Ernest O. Kretsinger, for appellants.

Leonard W. Colby, contra.

SULLIVAN, C. J.

This is an appeal from an order of confirmation made by the district court of Gage county in an action brought by the Farmers' & Merchants' State Bank against James Thornburg to foreclose a mortgage upon lot 2 of block 35 in the city of Beatrice. The ground upon which the order is assailed is that the appraisers deducted from the gross value of the property the sum of \$250 on account of a prior mortgage which had in fact been paid and released of record, but which was, nevertheless, through an error of the register of deeds, certified to the sheriff as a subsisting lien. The premises were valued by the appraisers at \$2,800, and the interest of the defendant, after deducting the canceled mortgage and taxes, amounting to \$12.05, was fixed at \$2,537.95. The selling price was \$1,692, which, it will be seen, was less than two-thirds of the value of such interest as fixed by the appraisers. Upon these facts, the district court did not err in overruling the motion to vacate the sale. It was the duty of the sheriff, acting in obedience to the provisions of section 491*d* of the Code of Civil Procedure, to deposit a copy of the appraisement in the office of the clerk of the district court before the sale was adver-

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tised. If this duty was performed,—and presumably it was,—the defendant knew, or at least was charged with knowledge of the value of his interest in the property as fixed by the appraisers, and he should have then moved to set the appraisement aside if he was dissatisfied with it. It has been frequently decided by this court, and is now the settled rule, that objections to an appraisement not founded upon fraud must be filed with the clerk of the district court before the sale occurs. *Vought v. Foxworthy*, 38 Nebr., 790; *Kearney Land & Investment Co. v. Aspinwall*, 45 Nebr., 601; *Security Investment Co. v. Sizer*, 58 Nebr., 669. It is not claimed that the appraisers in this case acted fraudulently in deducting the \$250 mortgage, and hence it was too late to question their appraisement after the sale had been made. The order of confirmation is

AFFIRMED.

J. K. SPEER V. STATE OF NEBRASKA.

FILED MARCH 5, 1902. No. 12,474.

1. **Proceeding for Prevention of Crime:** COSTS. The defendant in a proceeding for the prevention of crime may be taxed with costs only (1) where he is held to bail by the district court; and (2) where, for want of bail, he is sent to prison.
2. **COSTS:** CRIMINAL CODE: CONVICTION. Sections 500 and 501 of the Criminal Code, authorize the taxation of costs only in cases where a crime has been charged and there has been a conviction in accordance with established procedure.

ERROR from the district court for Holt county. Tried below before HARRINGTON, J. *Reversed.*

R. R. Dickson and *E. H. Benedict*, for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown*, Deputy, for the state.

SULLIVAN, C. J.

This was a proceeding for the prevention of crime, brought under chapter 26 of the Criminal Code. The

plaintiff in error was charged with having threatened to commit murder and was arrested, brought before a magistrate, and upon examination, required to enter into a recognizance for his appearance at the next term of the district court, and in the meantime to keep the peace and be of good behavior generally, and especially toward Ed E. Hunter, the person who filed the complaint, and against whom the threats had been made. Bail was given in compliance with the order, and at the next term of the district court the parties appeared, the witnesses were examined and the case disposed of in the following manner:

"The court being fully advised in the premises finds that there was sufficient and just grounds for the complaint in this case and for binding the said J. K. Speer over to keep the peace. The court further finds that it is not necessary to require the defendant to enter into any further security to keep the peace in the future. The court further finds that said J. K. Speer is liable for all costs in this cause both in the county court and in this court; it is therefore ordered and decreed that said J. K. Speer pay all costs in this cause, the said J. K. Speer to stand committed until said costs are paid."

Only one question is raised by the petition in error, and that is whether the court had authority under the findings to tax the costs to Speer. Sections 274, 275 and 276 of chapter 26 aforesaid are as follows:

"Sec. 274. The district court to which any transcript or recognizance to keep the peace, as aforesaid, shall be returned, shall, upon the appearance of the parties complaining and complained of, examine the witnesses produced upon oath, and may either discharge the accused from his recognizance or commitment, or may order him to enter into such other and further security as may be just thereafter to keep the peace and be of good behavior for such term of time as the court may order.

"Sec. 275. For want of such security the court shall commit the person accused to the jail of the county, there to remain until such order be complied with, or he be other-

wise discharged by due course of law; but in no case shall a person so failing to give security be confined for a period of time exceeding one year.

"Sec. 276. Whether such person be held to bail or be committed for want thereof, the court shall, in either case, render judgment against him for the costs of the prosecution and award execution therefor."

From a consideration of these provisions of the statute it is manifest that when a case of this kind is heard in the district court, one of two things must be done: Either the accused must be discharged from his recognizance or commitment, or else he must be required to give other and further security to keep the peace and be of good behavior for such period as the court may direct. If the order for further security be not complied with, the defendant may be committed to the county jail. Section 276 authorizes the taxation of costs against an accused person in a proceeding for the prevention of crime in two cases only: (1) where he is held to bail; and (2) where for want of bail he is sent to prison. Speer was not required to give bail by the district court and he was not committed for want of bail. There was therefore no authority under chapter 26 for taxing him with the costs of the proceeding.

It is suggested, however, that the decision of the district court may be warranted by sections 500 and 501 of the Criminal Code. In our judgment these sections have no relation whatever to proceedings under chapter 26. The plaintiff in error was not charged with the commission of any crime, and consequently the court had no power to punish him. Before sentence can be pronounced against a person brought for any purpose before a court of criminal jurisdiction, he must be charged and convicted in accordance with established procedure. The decision of the district court is

REVERSED.

NOTE.—*Peace Warrant*.—The circuit court is required to proceed with the examination *de novo*, and may therefore refuse to look at the legal sufficiency of the warrant under which the party was arrested. *Tomlin v. State*, 19 Ala., 9.—REPORTER.

FREDERICK HARRIS V. GEORGE JENNINGS ET AL.

FILED MARCH 5, 1902. No. 11,227.

1. **Nunc-Pro-Tunc Order: SATISFACTORY EVIDENCE: BETTER EVIDENCE: RECORD.** In deciding a motion for a nunc-pro-tunc order, the district court may act upon any satisfactory competent evidence in support thereof, although minutes of the proceedings, or other writing appearing in or among the records of the court are regarded as a better class of evidence.
2. **Evidence: NUNC-PRO-TUNC ENTRY.** Evidence examined and *held* sufficient to support an order made to correct the journals by a nunc-pro-tunc entry.
3. **Motion for New Trial.** A motion for a new trial must, in all cases, except for newly discovered evidence, be filed at the term at which the finding or decision sought to be vacated by the motion is rendered.
4. ———: **OVERRULED: ASSIGNMENTS OF ERROR UNAVAILING.** When a motion for a new trial is overruled, because not filed within the time required by statute, all matters necessarily included therein as grounds for a new trial are unavailing on review by proceedings in error.

ERROR from the district court for Webster county. Tried below before BEALL, J. *Affirmed.*

George R. Chaney, for plaintiff in error.

J. M. Chaffin, *contra.*

HOLCOMB, J.

By these proceedings plaintiff in error, plaintiff below, prosecutes error from an order or ruling of the district court sustaining a motion for a nunc-pro-tunc order. The ruling complained of is evidenced by the following entry on the journals of the trial court, as certified by the clerk: "Now, on this 11th day of April, A. D. 1899, this cause coming on to be heard, nunc-pro-tunc order granted on motion, showing injunction dissolved as of May 10th, 1898, to which ruling of the court the plaintiff excepts," etc. To the writer it appears doubtful whether the entry

quoted constitutes a valid final order, to reverse which proceedings in error will lie. It is more in the nature of a recital to the effect that the court granted the defendant's motion, and is in itself insufficient and lacking in the formal requisites to show that the court ordered and directed that its journals should be corrected so as to show an order of dissolution of the temporary injunction as of the time stated, and as a nunc-pro-tunc order. However, we pass this, treating the order as a valid and final one, from which error may be prosecuted. It is argued that the evidence is insufficient to sustain the order, and that there existed on the journals and records of the court no written memorandum, or other entry of any kind or character, as evidence that the court had at the time stated, or at any other time, ruled on the motion to dissolve the injunction, or had made an order of the kind sought to have evidenced by the correction of the journal asked for. The evidence in support of the motion was quite positive that the court had by a prior order, and at the time mentioned, dissolved the temporary injunction allowed in the case, and fixed the amount of a supersedeas bond to hold the injunction in force until a trial on the merits could be had at the sum of \$100. The evidence was presented in the form of affidavits by the parties to the action and their attorney. There was no evidence of the order having been made from any minute or other writing appearing on the journals, records, or dockets of the court, and it must be conceded that such evidence would be far more satisfactory, and is regarded as a better class of evidence; and in some jurisdictions it is held that such evidence is essential to sustain a nunc-pro-tunc order. After speaking to the same point in another case, it is said in *Ackerman v. Ackerman*, 61 Nebr., 72: "This court, however, has adopted the rule, which seems the better one, that in the exercise of the power of correction of its records the court is not confined to an examination of the judge's minutes, or written evidence, but may proceed upon any satisfactory evidence,"—citing *School District v. Bishop*, 46

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Nebr., 850, and cases there cited; *In re Wight*, 134 U. S., 136, 10 Sup. Ct. Rep., 487, 33 L. Ed., 865; *Jacks v. Adamson*, 56 Ohio St., 397, 47 N. E. Rep., 48; 17 Ency. Pl. & Pr., 931, note 2. The evidence in the case at bar, under the rule stated, was sufficient to sustain the finding and order of the trial court, and we can not rightfully disturb it on that account.

Another insurmountable obstacle presents itself: No motion was made for a new trial within the time provided by statute, and consequently the trial court was right in overruling the motion, as it did, on the ground that the motion was not filed within the time and during the term at which the order complained of was made. The term of court at which the order was entered adjourned *sine die* on April 11. The motion for a new trial was not filed until April 13, and after the adjournment of the term. This neglect is fatal as to any question required to be presented to the trial court by motion for a new trial before a reviewing court is authorized to pass upon such question. The motion not being presented within the time provided by statute, the court was without authority to grant it, and could either have stricken it from the files or overruled it. *Nelson v. Farmland Security Co.*, 58 Nebr., 604, and cases there cited. All matters included in the motion are therefore of no avail to the plaintiff in error, and we need not examine the evidence in support of the motion, or of the proceedings had during the trial, some of which were assigned in the motion as ground for a new trial, and on which error is now sought to be predicated. We find nothing in the record calling for a reversal of the ruling of which complaint is made.

For the reasons stated the order of the trial court is

AFFIRMED.

GONZALES-MANDELBAUM COMPANY V. JOSEPH BROGHAMER.

FILED MARCH 5, 1902. No. 11,329.

BILL of Exceptions: QUASHED: ASSIGNMENTS: VERDICT: EVIDENCE: MOTION TO QUASH. Where a bill of exceptions is quashed, and the only assignments of error relate to the introduction of evidence, and a general assignment that the judgment is contrary to the law and the evidence, the reviewing court will only inquire whether the pleadings will support the judgment rendered.

ERROR from the district court for Dawes county. Tried below before HOLLENBECK, J. *Affirmed.*

Albert W. Crites, for plaintiff in error.

Allen G. Fisher, *contra.*

HOLCOMB, J.

The trial court found generally in favor of the defendant in an action brought for the recovery of the value of certain merchandise alleged to have been sold and delivered to him by the plaintiff, and on such finding dismissed the action. Plaintiff prosecutes error. The only errors assigned relate to the rulings of the court in sustaining objections to the introduction of certain evidence, and a general assignment that the judgment is contrary to the law and the evidence. The bill of exceptions having heretofore been quashed, we are only required, in the consideration of such assignments of error, to ascertain from the record whether the judgment complained of can be sustained by the pleadings; and, the most casual examination disclosing such to be the case, the judgment of the trial court should be, and accordingly is,

AFFIRMED.

MRS. E. L. MOORE V. MICHAEL MORAN.

FILED MARCH 5, 1902. No. 11,348.

1. **Replevin: FIXTURES: MORTGAGE LIEN.** A mortgagee of real estate can not, because of his mortgage lien, maintain an action in replevin for the possession of property removed from the mortgaged premises which he claims as fixtures to the realty.
2. **Purchase of Land: THIRD PARTIES: NOTICE OF TITLE.** A purchaser of land, with notice of title in third persons to buildings situated thereon, takes the real estate subject to the rights of such third parties in and to such structures.
3. **Freehold: PERMANENT ANNEXATIONS: INTENT.** When it is evident that houses were intended as permanent annexations to the freehold, they become a part of the realty, and pass with a conveyance of it, and that without regard to the character of the foundations on which they stand. *Freeman v. Lynch*, 8 Nebr., 192.
4. **Building Used as Residence: PART OF FREEHOLD: TITLE: CLAIM OF OWNERSHIP: PURCHASE OF BUILDING.** A bona-fide grantee of real estate, without notice, on which is situated a building used as a residence and apparently a part of the freehold, will take title to the land, including such building, divested of a claim of ownership by a third party whose rights are based on an alleged purchase of such building from the grantor as chattel property.
5. **Petition in Error: AUTHENTICATION: TYPEWRITTEN SIGNATURE.** A petition in error can not be treated as a nullity and entirely disregarded because authenticated in the name of plaintiff in error by her attorney, giving his name, each appearing only in type-writing.

ERROR from the district court for Keith county. Tried below before GRIMES, J. *Reversed.*

John H. Bower, for plaintiff in error.

Wilcox & Halligan, *contra.*

HOLCOMB, J.

This is an action in replevin, the property in controversy being sections of lumber and building material which prior to the replevin action had formed the main portion of a

small dwelling house, 14x18 feet in size, with an addition thereto 12x14 feet. The house was located on a tract of real estate purchased by the plaintiff in the replevin action but a short time prior to the institution of the action. The defendant claimed the property in dispute, which composed the main part of the building, by reason of an alleged purchase of the then owner of the real estate, who afterwards conveyed to the plaintiff, and claimed the addition as her own property, which she had loaned to the grantee of plaintiff while occupying the real estate as the owner thereof. After the submission of the evidence the court, by a peremptory instruction, directed a verdict for the plaintiff, leaving to the jury only the question of damage, which it was stipulated was only nominal. A motion for a new trial being overruled, the defendant prosecutes error to secure a reversal of the judgment rendered against her.

As to the principal issues involved, the evidence is without substantial conflict or contradiction. The record discloses that the plaintiff in the replevin action had, long prior to the transaction out of which the litigation arose, been the owner of the real estate on which the buildings were situated and had sold the same to one Wilbur, who, to secure the purchase price, executed a note secured by a mortgage thereon in favor of the plaintiff as grantor. After the purchase of the land, Wilbur bought of the defendant in replevin the main portion of the building in controversy, agreeing to pay therefor \$25. He also at the same time borrowed of her the structure known as the "addition," agreeing to return the same at a future time. He neither paid for the main building nor returned the addition. The buildings were placed on the land on stones laid on the surface of the ground, with railroad ties placed between the stones, and against which dirt was thrown, forming a sort of embankment to the foundation as thus made. The main building consisted of two rooms, lathed and plastered, and with a brick chimney. The addition formed only one room, with no inside finish, and was fast-

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ened to the main building with spike nails. It is conclusively shown that the plaintiff had notice of the character of the ownership of the addition, and that it belonged to the defendant. Wilbur, a short time before this action was instituted, reconveyed the real estate by the usual warranty deed to his grantor, in satisfaction of the amount owing on the purchase price, which was secured by the mortgage mentioned. Prior to the sale of the real estate to the plaintiff, he had sold to the defendant the main portion of the building, of which the material composing the same is in controversy; and she, relying on this contract of sale and her ownership of the addition, removed the same from the real estate on which located. Whether the deed reconveying the premises to the plaintiff was executed and delivered before the defendant had removed the building, or a portion thereof, is in controversy. The deed bears date December 14, and plaintiff testifies that it was executed and delivered on that date. The addition appears to have been removed about that date, and the main structure subsequently thereto. The transaction resulting in a reselling of the main structure to the defendant, and her authority to remove the same, with the addition then belonging to her, occurred during the month of September previous. It is testified that the Wilburs gave possession of the premises to plaintiff prior to the execution of the deed reconveying the land to him. The plaintiff, to establish his right to the property, relies exclusively on his title thereto derived from the deed of conveyance of the real estate, together with such rights as accrued to him through his prior mortgage thereon. But the mortgage gave to the plaintiff only a lien on the real estate embraced in its terms, and, until the equities of the mortgagor have been adjusted and foreclosed, the mortgagee had no such legal title or possessory right to property in the nature of chattels removed from the mortgaged premises, even though claimed as fixtures, as would establish the mortgagee's right thereto in a legal action of replevin. He could not,

because of his mortgage lien on the land, maintain an action in replevin for property removed therefrom, and claimed by him to be fixtures and appurtenant to the real estate. *Davidson v. Cox*, 11 Nebr., 250; *Hoagland v. Lowe*, 39 Nebr., 397; *Triplett v. Parmlee*, 16 Nebr., 649; *Ellsworth v. McDowell*, 44 Nebr., 707.

This brings us to a consideration of the plaintiff's right to the property in controversy through and by virtue of the deed of conveyance of the real estate on which the structures were situated. Conceding the execution and delivery of the deed the day it bears date, the evidence is conclusive that at the time he purchased the land the plaintiff was aware the addition to the main structure was owned by the defendant in replevin, and that it had been placed on the real estate temporarily, and with the intention of the parties to return the same to the owner in the near future. He was personally cognizant of the fact that the landowner never acquired title thereto, and had possession of the structure only as a borrowed chattel.

The evidence does not disclose such attaching to the soil or the main building as to make it a fixture as a matter of law. It seems reasonably clear that all parties regarded and treated it as chattel property, that it was not the intention to affix it permanently to the land, and that it remained the property of the person loaning the same,—the defendant in the replevin action,—of all of which the plaintiff had notice. *Freeman v. Lynch*, 8 Nebr., 192; *Sword v. Low*, 122 Ill., 487; *McDonald v. Shepard*, 25 Kan., 112.

In any view of the record as presented to us, the defendant's title to this portion of the property was so indisputably established by the evidence that no question of fact was left for the determination of the jury. The rule is that a purchaser of land with notice of title in third persons to buildings situated thereon takes the real estate subject to the rights of such third parties in and to such structures. *Wilgus v. Gettings*, 21 Ia., 177; *Coleman v. Lewis*, 27 Pa., 291; *Crippen v. Morrison*, 13 Mich., 23, 33.

As to the property which comprises the main structure, the facts and circumstances are dissimilar. The evidence discloses that it was purchased of the defendant in the replevin action, and erected by the owner of the land, and finished as a residence, and apparently became a permanent accession to the freehold. It bore all the characteristics of a permanent fixture, and, so far as the evidence throws light on the question, was so intended when constructed. The defendant, who sold the house to Wilbur, so recognized the building as a part of the realty and filed a mechanic's lien for the purpose of securing to her the contract price for said building. It was used and occupied by the owner as a dwelling house, and apparently, to all intents and purposes, became a part of the realty, in the same manner as buildings in general do. The defendant claims the property by virtue of an alleged contract of sale made in September prior to the conveyance of the land to plaintiff in the following December. Nothing was accomplished in securing the delivery and possession of the property in pursuance of the alleged sale until after the plaintiff had purchased the land, and acquired title thereto and the possession thereof by his deed of conveyance dated December 14, 1897. He had no notice of the defendant's claim of title, and was a bona-fide purchaser, without reservation or exception by the grantor, and became entitled to all property that properly passed by the deed of conveyance he held. He relied on the situation as it then existed, disclosing, as it did, the main residence structure as a fixture belonging to, and part of, the real estate which he was purchasing. Under such circumstances, it can hardly be doubted that title to the building passed to him with the land, and whatever right the defendant may have had by her attempted purchase of the building as a chattel was thereby lost and she could not thereafter, as against the grantee, assert her right to it as a movable chattel. *Freeman v. Lynch*, 8 Nebr., 192; *Arlington Mill & Elevator Co. v. Yates*, 57 Nebr., 286, 292, and authorities therein cited; *Knowlton*

v. Johnson, 37 Mich., 47; *Ridgeway Stove Co. v. Way*, 141 Mass., 557; *Case Mfg. Co. v. Garven*, 45 Ohio St., 289; *Landon v. Platt*, 34 Conn., 517; *Rowand v. Anderson*, 33 Kan., 264; *Climer v. Wallace*, 28 Mo., 556. We conclude, therefore, that the plaintiff's title to such property is beyond dispute, and as to it no error was committed in directing a verdict for plaintiff.

It is argued by the defendant in error that, because the petition in error is not subscribed by the plaintiff in error or her attorney, it must be treated as a nullity, and as though no petition in error had in fact been filed in the case. The petition appears to be authenticated in the name of the plaintiff in error by her attorney in his own name, the names appearing only in typewriting. While probably the petition would be vulnerable to a motion to strike because not properly subscribed, we do not think it can be treated as a nullity and disregarded altogether. The petition in error is before us, purporting to be a pleading of the plaintiff in error, and an application of the party aggrieved for a review of the trial had, resulting in a judgment against her, assigning certain alleged errors in the trial of the action in the court below, and is, we hold, sufficient to require from us a consideration of the errors therein complained of.

The judgment, for the reasons first stated, must be reversed and the cause remanded, which is accordingly done.

REVERSED AND REMANDED.

OMAHA LOAN & TRUST COMPANY, APPELLEE, V. MICHAEL
WALENZ, APPELLANT.

FILED MARCH 5, 1902. No. 11,396.

1. **Motion to Vacate.** The filing of a motion to vacate a decree under the provision of subdivision 3 of section 602 of the Code of Civil Procedure does not of itself have the effect of avoiding or suspending further proceedings in the execution of the decree,

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nor would a sale made in pursuance thereof be invalidated because such motion had not been acted on by the court nor waived by the party filing the same.

2. **Motion: APPEAL.** The action or non-action of a trial court on such motion can not be reviewed on an appeal from a final order of confirmation of sale.

APPEAL from the district court for Douglas county.
Heard below before DICKINSON, J. *Affirmed.*

William H. Crow and L. F. Hale, for appellant.

E. H. Scott, contra.

HOLCOMB, J.

On appeal from an order of confirmation of sale of real estate in foreclosure proceedings appellant argues that the sale and order of confirmation can not be sustained, because, as alleged, the decree by virtue of which the subsequent proceedings were had is invalid and of no force and effect. The contention is grounded on the claim that after the rendition of the decree, and at a subsequent term, a motion was presented to the trial court to vacate and set aside the decree under the provision of the third subdivision of section 602 of the Code of Civil Procedure, authorizing the court to vacate its own decrees at a subsequent term on the ground of "mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order"; and that such motion has not been acted upon by the trial court nor waived by the appellant. If this is true,—which we do not undertake to determine,—there should be, and probably, upon calling the attention of the trial court to the fact, would be, a ruling on the motion to vacate the decree, allowing to either party, if dissatisfied, an exception, with the right of review. But, so long as the decree remains in force, is not vacated, and no proceedings are taken to reverse it or stay its execution, the mere filing of a motion to set it aside, on which no action is taken, will not have the legal effect of rendering it inoperative, or prevent a party from enforcing his rights

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thereunder. No effort appears to have been made under the authority contained in section 607 to have further proceedings in the cause suspended pending a hearing on the motion to vacate, and no order suspending further proceedings under the decree appears in the record. The decree being in full force and effect notwithstanding the filing of a motion to have it vacated, and no suspension having been granted, the appellee was authorized to proceed thereunder, and sell the mortgaged property to satisfy the amount found due; and, the sale made in pursuance thereof being regular in all respects, and in conformity with law, the court very properly entered the order of confirmation appealed from. We may assume, in the absence of any record, that the motion to vacate has been overruled as without merit, in which event there can scarcely be any question as to the validity and effectiveness of the decree at all times since its rendition. In any event, we can not review the action or non-action of the trial court on the motion to vacate its decree in proceedings on appeal from a final order of confirmation. The order complained of is accordingly

AFFIRMED.

JOHN H. MERCHANT, APPELLEE, V. ANTHONY BAUMEISTER
ET AL., APPELLANTS.

FILED MARCH 5, 1902. No. 11,402.

Confirmation: APPEAL: INADEQUATE APPRAISEMENT.

APPEAL from the district court for Douglas county.
Heard below before SCOTT, J. *Affirmed.*

A. N. Ferguson, for appellants.

Dexter L. Thomas, contra.

HOLCOMB, J.

From an order of confirmation of a sale of real estate in foreclosure proceedings, defendants appeal, presenting

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for our consideration only the alleged inadequacy of the appraisement made, which it is contended is so much below the true value as to be presumptively fraudulent. No actual fraud is charged or attempted to be proved. Several affidavits which are preserved by a bill of exceptions were filed in support of and against the appraisement as made by the officers acting under the decree. The evidence is conflicting and may be said to be fairly well balanced. The trial court, in the exercise of its equitable powers, being authorized to direct a new sale if the one made was for a manifestly inadequate price, notwithstanding the property sold for more than two-thirds of the appraised value, and not having done so, we can not say there was an abuse of discretion, or that the appraisement is presumptively fraudulent. The most that can be said is that the appraisers were mistaken, only, in their valuation, and this alone is insufficient to warrant the reversal of the order of confirmation. *Williams v. Taylor*, 63 Nebr., 717; *Cole v. Willard*, 62 Nebr., 839, and authorities there cited.

The order of confirmation ought to be affirmed, which is accordingly done.

AFFIRMED.

HENRY A. PIERCE, APPELLEE, v. ALICE E. ATWOOD, APPELLANT.*

FILED MARCH 5, 1902. No. 11,017.

1. **Collateral Security: RIGHT OF SURETY: RELEASE BY CREDITOR.** A surety has a right to demand that any securities held by the creditor as collateral for the payment of the debt shall be applied in satisfaction thereof, and if the creditor releases the collateral the surety will be discharged to the extent of the value of the collateral so released.
2. ———: ———: ———. If money is deposited upon such conditions that the creditor can require it to be applied upon his claim, and he consents that it be turned over to the principal debtor, without consent of the guarantor, the guarantor is thereby released.

*Judgment modified July 21, 1902, and rehearing denied. See clerk's record. See *Pierce v. Atwood* under Cases Modified, page lxiii.

APPEAL from the district court for Dodge county.
Heard below before GRIMISON, J. *Reversed in part.*

Enos F. Gray and William H. Atwood, for appellant.

Courtright & Sidner, *contra*.

SEDGWICK, J.

This is an action to foreclose a mortgage made by Alice E. Atwood and her husband, W. H. Atwood, upon the separate property of the wife. Mrs. Atwood defends upon the ground that the loan of \$1,000 which the mortgage was made to secure was made to her husband for his sole use and benefit, and that she signed the note and pledged her property for its payment, as surety for her husband. She further alleges that the plaintiff had within his control funds belonging to her husband sufficient to discharge the mortgage debt, and that he voluntarily released the same without her knowledge or consent. It is elementary law that a creditor who by his voluntary act parts with security for his debt thereby releases a surety or guarantor, to the extent of the value of the security parted with. *Bronson v. McCormick Harvesting Machine Co.*, 52 Nebr., 342; *City of Maquoketa v. Willey*, 35 Ia., 323; *Commercial Nat. Bank v. Henninger*, 105 Pa. St. 496. This requires us to examine the record, and to ascertain whether the plaintiff has so conducted himself in relation to this debt, and to any fund belonging to W. H. Atwood of which he had control, as to release Mrs. Atwood and her property from liability therefor. The evidence discloses that G. A. Davis and H. A. Pierce of Castile, N. Y., were engaged in the banking business in their home city, and also carried on a real estate loan business in Nebraska. In 1888 W. H. Atwood commenced attending to their business in the city of Fremont, and vicinity,—making loans, collecting interest and matured loans, and acting as their attorney in such foreclosure proceedings as were necessary. In July, 1894, W. H. Atwood borrowed of Davis & Pierce, \$1,000,

his wife joining in the note, and executing the mortgage in controversy to secure the same. The mortgage covers the residence of the Atwoods, the title to which stood in the name of the wife; and we may assume that Davis and Pierce had knowledge of her title, as they had made a previous loan on this same property, and an abstract of title had been examined and approved by them when the first loan was made. In 1896 Atwood ceased collecting for Davis & Pierce, but continued to attend to certain foreclosure cases as their attorney. Atwood testified at that time a dispute arose over the amount due him from the firm, and that he requested a settlement and an application of the amount due him for services in discharge of this mortgage. The conversation relating to this matter was had with Davis, who died previous to the trial, and under the ruling in *Mead v. Weaver*, 42 Nebr., 149, this evidence can not be considered, being incompetent under section 329 of our Code of Civil Procedure. In May, 1896, a fee of \$375 due Atwood in what is called the "Nielson Case" was applied on this loan, being used to pay one matured coupon, and \$301, indorsed on the principal note. In November, 1895, a second mortgage was made upon the premises to Mrs. Cottrell, who filed a cross-bill in this action and obtained a decree of foreclosure; but, as no tenable objections are made to the decree so far as it directs a foreclosure of this mortgage, it will not be further considered. In 1897 there were two cases pending in the circuit court of the United States for the district of Nebraska, brought by Davis & Pierce to foreclose mortgages held by them. In both cases Atwood was attorney for the plaintiffs. In one of these, known as the "Abbott Case," Atwood collected the sum of \$2,630.48. With \$2,530 of this sum he purchased three drafts payable to his own order, retaining the balance in cash. He then filed an attorney's lien in the other case, which is called the "Meays Case," claiming \$7,000, due him for fees for services performed for Davis & Pierce. The plaintiff thereupon formally discharged him as attorney in the case, and he

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then filed a petition in intervention setting out his claim for services, and Pierce, the surviving partner, filed an answer and cross-petition. In December, 1897, the three drafts purchased by Atwood were deposited in escrow with one Briggs, under the following agreement made between the parties:

"Whereas, the amounts represented by drafts No. 172,817, and 172,818, and 172,819, aggregating \$2,530, drawn by First National Bank of Fremont on Chase National Bank in favor of William H. Atwood, are in dispute between said Atwood, on one part, and H. A. Pierce and the executors of Giles A. Davis, on the other part, each party claiming the same, which dispute is about to be litigated in the United States Court. It is hereby agreed that said drafts shall be and hereby are placed on deposit with A. H. Briggs to be by him held until the termination of said dispute in court, and then delivered to the successful party. In case the amount thereby represented shall be divided, said A. H. Briggs shall cash said drafts and apportion the proceeds."

In the cross-bill filed by Pierce in the Meays case in the federal court, he set out the note secured by the mortgage in controversy in this action as a demand against Atwood.

A special master was appointed to report the facts under the law, and, after hearing the evidence, reported that "at the time William H. Atwood filed his intervening petition herein he had in his hands, as moneys of the cross-complainant, the sum of \$2,630.48," and "that the services rendered to the said complainant by the said William H. Atwood were of the value of \$1,592.39, and that the said William H. Atwood is entitled to receive said last-named amount as compensation for services rendered the said complainant," and "that the said William H. Atwood is indebted to the said cross-complainant upon the promissory note and coupon mentioned in the answer and cross-bill of Henry A. Pierce herein, and that the said note and coupon evidence a valid and subsisting obligation," and "that the cross-complainant herein is entitled to the entire

fund paid into this court upon the foreclosure proceedings in the above-entitled cause," and "that the cross-complainant herein is entitled to receive the said sum of \$2,630.48 received by William H. Atwood as aforesaid, less the said amount of \$1,592.39, the amount to which said William H. Atwood is entitled for his services aforesaid," and "that this disbursement will settle and pay all matters in controversy between said Atwood and said Pierce, except that said Atwood will still owe to the said Pierce the two notes mentioned in the cross-complaint of said Pierce,—one of said notes being for \$1,000 face, dated July 26th, 1894, and the other one being for \$70 face, of the same date, each having an indorsement thereon,"—and the following conclusions of law:

"(1.) I find that the complainant in said cross-bill, Henry A. Pierce, is entitled to receive the entire funds paid into this court upon the foreclosure proceedings in the above-entitled cause. (2.) I find that the complainant in said cross-bill, Henry A. Pierce, is entitled to receive of the \$2,630.48, received as aforesaid, by said William H. Atwood, the sum of \$1,038.09. (3.) I further find that said William H. Atwood is entitled to retain of the \$2,630.48 received by him the sum of \$1,592.39. (4.) I further find that the promissory note and coupon executed by the said William H. Atwood, and mentioned in the amended cross-bill of the said Henry A. Pierce herein, is a valid and subsisting obligation, and evidences a valid indebtedness from said William H. Atwood to said Henry A. Pierce. (5.) I further find (being requested by the parties to make a finding as to costs) that the costs of this proceeding should be borne and paid by the said cross-complainant, Henry A. Pierce. (6.) I further find that a decree should be entered herein, upon the issues aforesaid, awarding out of the \$2,630.48 aforesaid, the sum of \$1,592.39 to the said William H. Atwood, and the said \$1,038.09 to the said cross-complainant, Henry A. Pierce, and awarding to the said Henry A. Pierce the entire sum paid into this court upon the foreclosure proceedings in the above-entitled cause,

and adjudging the indebtedness evidenced by the promissory note and coupon signed by said William H. Atwood, and mentioned in the amended cross-bill herein, to be valid and subsisting, and decreeing that the said complainant, Henry A. Pierce, pay the costs of this proceeding, and that judgment against him be entered therefor, and that execution be awarded thereon; that this settlement and disbursement of the funds be decreed to cancel all matters in dispute between the parties under the issues of this case, except that said note and coupon signed by said William H. Atwood, and now held by said Pierce, remain unpaid and a subsisting obligation from said Atwood to said Pierce thereon."

Shortly after the filing of this report the following stipulation was made and filed by the parties:

"Comes now William H. Atwood, interlocutory petitioner, and Henry A. Pierce, cross-complainant, and stipulate and move the court that the findings of fact of W. D. McHugh, special master, be approved, and that the conclusions of law of said special master be approved except as to the taxation of costs, and that decree be entered in accordance with the recommendation of said master, except that no attorney's docket fee be taxed in this controversy, and that the costs of this controversy be taxed equally against the interlocutory petitioner and cross-complainant."

A decree was thereupon entered conforming to the master's report, and thereafter the money in the hands of Briggs was by him paid over to Pierce and Atwood; each receiving the amount awarded him by the master's report.

It will be seen that, after the Abbott Case had been disposed of, issues were made up between Atwood, on the one part, and Davis and Pierce, on the other, involving the whole controversy between them, including the note herein sued upon, which Davis and Pierce had brought into those issues as a claim in their favor against Atwood. The issues being in that condition, the money, \$2,530, which both parties to the litigation claimed, was by agreement be-

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tween the parties placed in the hands of a third party, to be held by him "until the termination of said dispute in court." The meaning of the stipulation, clearly, is that whatever shall be due to either party out of this money on deposit upon the final determination of the court of all of the issues then presented to the court shall be paid to the party to whom it is due. It is clear that a court of equity would enforce this agreement, and that there was no way in which Atwood could get this money for his own use without satisfying the whole claim of Pierce & Davis, unless Pierce & Davis should voluntarily turn the money over to him. The master's report is predicated upon the idea that Pierce & Davis would release their claim on a part of the funds in the hands of Briggs, and dismiss their suit as to the note in question, and reinstate the note and hold it against Atwood. This idea was undoubtedly inspired by the parties themselves as the law would not have made such a disposition of the case without the consent of both parties, and, indeed, the consent of the parties is contained in their stipulation filed shortly after. The decree of the court was entered according to the stipulation. Could Pierce and Davis, after consenting that this money should be paid to Atwood, still hold the homestead of Mrs. Atwood, which she pledged as guarantor for her husband? The weight of authority is that a surety, when sued for the debt of his principal, may offset a claim which is due to the principal from the creditor. 1 Brandt, Suretyship & Guaranty, sec. 236. Our statute provides that, "when cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counter-claim or set-off could have been set up, neither can be deprived of the benefit thereof by assignment or death of the other, but the two demands must be deemed compensated, so far as they equal each other." Code of Civil Procedure, sec. 106. And it is insisted that the common-law rule that the creditor may pay an independent debt which he owes to the principal, and still hold the sureties liable for the whole debt guaranteed by him,

does not obtain in this state, or, at all events, if the creditor has any lien upon or any means of controlling the application of any funds of the principal, so as to make it available in the satisfaction of his claim, he can not relinquish such fund to the principal without releasing the surety, and we think that this is undoubtedly the rule. In *City of Maquoketa v. Willey*, 35 Ia., 323, it is said:

"The creditor, however, can not relinquish any hold he has acquired upon the property of the debtor without resorting to the proper proceedings to make therefrom the debt. And this rule is alike applicable if the property has been voluntarily placed in the hands of the creditor, or he has acquired a lien thereon by proceedings at law. This is unquestionably the rule of the authorities. They will be found collected and discussed in 3 Leading Cases in Equity (Hare & Wallace's notes, p. 552, *Rus v. Berrington*) and 2 Am. Leading Cases, 260 (Hare & Wallace's Notes to *Pain v. Packard* and *King v. Baldwin*). See upon this point *Chambers v. Cochran & Brock*, 18 Ia., 159. This rule is well founded upon the equitable doctrine that he who, by his wilful act, causes a loss, ought to endure its consequences and not transfer its effects to an innocent party. The creditor, having in his hands property to secure the debt, voluntarily placed there by the principal debtor, would not be permitted to relinquish it or appropriate it to other purposes. By such an act the property would be lost so far as the satisfaction of the debt is affected. The case is not different if the property should come to the hands of the creditor by his own act, as through the institution of legal proceedings. In either case it is plain that equity and fair dealing toward the surety demand that he appropriate the property to the payment of the debt."

The question of the ownership of the property, and the right of the creditor to apply it upon his claim, had, in a former action, been submitted to a referee, who had reported that the property belonged to a third party and was not applicable upon the claim of the plaintiff. The

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parties afterward stipulated that the report of the referee should be confirmed, which was done. Upon this branch of the case the court said:

"The judgment was rendered upon the referee's report without objection and upon the consent of the city; that is, of its attorney in the case, for whose act in this matter the city must be held responsible. As we have seen, the judgment was unauthorized by law. It is then the case of a judgment by consent adverse to the rights and interest of the defendant. Under it certain property upon which the city had a legal hold for the satisfaction of its claim against Murphy was discharged and thus lost to defendant. It was a voluntary relinquishment, for the judgment by consent, contrary to the rules of law and the rights of the parties, must be so considered. Under the principles above announced, the loss resulting therefrom must be borne alone by the plaintiff."

And so in the case at bar the money was so placed that it was under the control of the plaintiff, so that without his consent its application upon his claim could not have been prevented. It is manifest that under such circumstances his consent that this money be paid to the principal debtor would release the surety.

The decree of the district court, on the petition of plaintiff, is reversed and the cause remanded with instructions to dismiss the action as to Mrs. Atwood, and to render judgment for the amount of the note and interest against Mr. Atwood. The decree, on the cross-petition of Cottrell, is affirmed.

JUDGMENT ACCORDINGLY.

**E. A. BENSON V. JOHN S. CAULFIELD, REVIVED IN THE NAME
OF CHARLES E. CLAPP, ADMINISTRATOR.**

FILED MARCH 5, 1902. No. 11,206.

Commissioner's opinion, Department No. 1.

1. **Indemnity Bond: RECITALS: LEVY: RECOVERY.** The fact that an indemnity bond recites that the officer has been directed to levy upon property of the judgment debtor, will not prevent a recovery, if he was actually directed to levy upon property of a third party, and does so at request of the principal in the bond.
2. —: **CONDITION: PAYMENT OF JUDGMENT: BREACH OF BOND.** Where a bond is conditioned to indemnify the officer against all "harm, trouble, damage, costs, suits, actions, judgments and executions" growing out of the levy, the payment by the officer, after its affirmance, of a judgment in conversion for taking the property, constitutes a new breach of the bond.
3. **Statute of Limitations.** The statute of limitations does not run against an action for damages upon such breach until the statutory time after the payment.
4. **Surety: PAYMENT OF CONVERSION: ASSIGNMENT OF JUDGMENT: CONSIDERATION.** The fact that the funds for the payment of the conversion judgment were furnished by a surety on the officer's bond as sheriff does not impeach an allegation that the officer paid it, and the furnishing of the funds is a sufficient consideration for an assignment of the indemnity to the officer's surety.

ERROR from the district court for Douglas county.
Tried below before POWELL, J. *Affirmed upon filing of remittitur.*

Hall & McCulloch, for plaintiff in error.

Byron G. Burbank, contra.

HASTINGS, C.

This action is brought upon an indemnity bond given April 24, 1888, to William Coburn, sheriff of Douglas county, in the penal sum of \$1,955, to indemnify Coburn against all "harm, trouble, damage, costs, suits, actions, judgments and executions" that might arise, come, or be

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brought against him on account of the levy of an execution on a judgment in favor of William L. Hall and against the New York Storage & Loan Company. The execution was, at the request of plaintiff, levied upon certain property which was claimed by one John L. Watson. At the close of plaintiff's testimony, defendant Benson moved for an instruction in his favor, and again at the close of the case renewed the motion, and at that time plaintiff also asked a similar instruction; and the court granted plaintiff's request, and instructed as follows:

"You are instructed that under the pleadings, the law and the evidence herein, you should return a verdict for the plaintiff against the defendant E. A. Benson, for the sum of three thousand four hundred and twenty-one and 25-100 (\$3,421.25) dollars, being \$1,955 of principal and \$1,466.25 interest, at seven per cent. from April 24, 1888, to February 6, 1899."

Twenty-seven errors are assigned, only one of which, viz., the fourth, which complains of the giving of the above instruction, need be considered. Evidently, if this instruction was correct, and no other verdict was possible in the case, it is immaterial what errors there may have been in the admission or rejection of evidence, except as such errors affect the question of the propriety of this instruction. The rightfulness of this instruction is assailed for three principal reasons: (1) Evidence does not show any breach of the bond; (2) action upon it was barred by the statute of limitations; and (3) no cause of action arose in favor of plaintiff, Caulfield. The bond was in favor of Coburn, and it is claimed that Coburn never acquired any right of action, because he paid nothing on the judgment, and could assign none to Caulfield.

The first point is urged on the ground that the bond recites that the execution is directed to be levied upon the property of the New York Storage & Loan Company. It is urged that, if this had been done, there would have arisen no trouble, because of the levy, and that the bond provides for no indemnity against taking anybody's else

property. This objection can not be sustained, for the reason, first, that it does away with the palpable meaning of the bond, which is to indemnify the sheriff against levying upon property to which he was directed, as the testimony shows, by the judgment creditor Hall. In the next place, it appears clearly that Hall's judgment was set aside and the execution quashed, so that it does not follow that liability would not have attached, if the levy had been made upon the property of the storage company. The second reason hardly seems to be any better. It is true that the bond indemnified Coburn against judgments. Numerous cases are cited by plaintiff in error, that where one is indemnified against judgments a right of action accrues when judgment is rendered, and damages to an amount sufficient for the satisfaction of such judgment are recoverable at once. No case, however, has been shown which holds that only one condition of the bond creates a cause of action. The bond sued upon here contained an indemnity not only against judgments, but against harm, costs, suits and damages. It is true that the judgment which was finally paid by Coburn in this action was rendered March 14, 1893, and this action was begun December 7, 1898. It is also true, however, that September 30, 1898, Coburn paid the judgment recovered by Watson for conversion of the goods levied upon, with interest and costs, amounting to \$5,416. That this was a valid and enforceable judgment, duly and regularly obtained against the sheriff on account of the levy of this writ of execution, seems clear upon the evidence, and was once determined by this court. *Coburn v. Watson*, 48 Nebr., 257. That the making of this payment under compulsion of the judgment was a "harm and damage" arising out of the levy of the execution procured by means of this indemnity bond, seems clear. If so, it was a new breach of the condition of the bond and recoverable-for, independently of the question whether there could have been a recovery for the breach caused by the mere rendition of the judgment. If this is true, the statute of limitations would not begin to

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run as to this breach of the bond until the time of payment, September 30, 1898. The third reason assigned for considering this instruction for plaintiff erroneous, rests upon the proofs adduced as to the manner of payment of the judgment recovered against Coburn. It appears that it was paid by the plaintiff, Caulfield, through Coburn. Caulfield, as the proof shows, gave Coburn a note secured by mortgage on Caulfield's property, and payable to Watson, and cash to make up the total amount due on the judgment, \$5,416. Coburn used these funds to pay the judgment, took a receipt to himself, and assigned his indemnity to plaintiff Caulfield, who was one of the sureties on his sheriff's bond. This was ample consideration for the assignment of the bond, and supports the allegation that Coburn paid the judgment, and, for value, assigned the indemnity.

As above suggested, we do not think it necessary to examine the alleged errors in the admission of testimony. They could have produced no harm, in our view of the case, because we find the testimony, as a whole, enough to compel a verdict in favor of Caulfield to the amount of his assigned indemnity. The verdict, however, is too large. The penalty of the bond is only \$1,955. The breach of the bond for which this action is brought, and this recovery had, occurred on September 30, 1898. The right to sue for the breach by reason of the rendition of judgment in March, 1893, was barred by the statute of limitations, if it ever existed. The limit of damages for the recovery upon a penal bond in this state seems to be the amount of the penalty and interest from the time the condition is broken. *Mullen v. Morris*, 43 Nebr., 596, 608. The extent, therefore, of plaintiff's recovery would be \$1,955 and interest at seven per cent from September 30, 1898, up to the first day of the term at which judgment in this action was rendered, viz., February 6, 1899. This amount is \$47.90. The interest, however, allowed in the verdict is \$1,466.25, —an excess of \$1,418.35 over the true amount. The instruction complained of was erroneous to that extent. A

new trial should be granted, or a remittitur directed for this sum. It is therefore recommended that if the above excess interest of \$1,418.35 be remitted from the judgment in this case within thirty days, that the judgment be affirmed as to the remainder, and interest from the date of its rendition; that otherwise the judgment be reversed and the cause remanded; and that plaintiff in error recover costs in this court.

DAY, C., concurs. KIRKPATRICK, C., not sitting.

By the Court: For the reasons given in the foregoing opinion, it is ordered that if the excess interest of \$1,418.35 be remitted from the judgment in this case within thirty days, the judgment be affirmed as to the remainder, with interest from the date of its rendition; otherwise that the judgment be reversed and the cause remanded; and that plaintiff in error recover costs in this court.

JUDGMENT ACCORDINGLY.

BANKERS' RESERVE LIFE ASSOCIATION V. LANTIE J. FINN.

FILED MARCH 5, 1902. No. 11,257.

Commissioner's opinion, Department No. 1.

1. **Tendering Answer After Demurrer: WAIVER.** Tendering answer, and asking leave to file same, after the overruling of a demurrer to a petition, is a waiver of mere formal defects in the petition and of any irregularity in the time or manner of acting on the demurrer.
2. **Refusal of Leave to File.** Not error to refuse leave to file an answer setting up that the action was prematurely brought where the facts alleged were insufficient to sustain such plea.
3. **Life Insurance Policy: PROOF OF DEATH.** Under a life insurance policy providing for payment in ninety days after satisfactory proof of death, an objection to such proofs, which in no way impeaches the sufficiency of the showing of the death of

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assured, but complains as to the condition of his health, when first insured, shows no ground for delaying action more than ninety days after such proof was submitted.

4. **Default: ISSUE OF LAW: COSTS.** Under section 432 of the Code of Civil Procedure, the court, on the determination of an issue of law, or when a party is in default, may, at the request of the party not in default, assess damages on proof without the intervention of a jury.

ERROR from the district court for Douglas county.
Tried below before SCOTT, J. *Affirmed.*

Timothy J. Mahoney and *J. A. C. Kennedy*, for plaintiff in error.

Weaver & Giller, contra.

HASTINGS, C.

Plaintiff in error and defendant below in this case complains "that the entire course pursued by the district court in this case was one of arbitrary abuse of authority, by which the plaintiff in error was unlawfully deprived of every and any opportunity to be heard upon the merits of the case." It certainly seems that the defendant was not permitted to be heard upon the merits of his case. It remains to be ascertained whether there were any merits to be examined. This is an action upon a policy of life insurance, and to plaintiff's petition below a motion was interposed to require the plaintiff to make her petition more certain by setting out the date of the delivery of the policy and the insured's condition of health at that time. This policy contained the following clause: "This policy takes effect and becomes binding upon the association only upon the actual delivery thereof to the applicant while in life and in good health, and the payment in cash to the association of the first annual premium or installment thereof while in good health." The petition alleges that July 1, 1897, the deceased "took out a policy of life insurance in the defendant association." As the policy expressly provided that it should have no effect until delivery, this was

an allegation of delivery to the deceased on that date. Granting that the provision in question was a condition precedent, there was no occasion shown for requiring any more specific plea of its performance than was contained in the petition, which alleged: "All of the conditions of said policy to be performed and fulfilled by said Harold H. Finn or plaintiff have been duly performed and complied with." This allegation was certainly a compliance with section 128 of the Code of Civil Procedure, and there seems to have been no error on the part of the court in overruling the motion. The motion had been filed by T. W. Blackburn as defendant's attorney. He took an exception to its overruling and then withdrew his appearance as attorney for the defendant. This was on March 28. On March 30, a general demurrer was filed on behalf of defendant, signed, "B. H. Robison, Pres." Defendant employed no attorney until April 29 when Mr. Robison states that he employed T. J. Mahoney, and was informed by Mr. Mahoney that the latter was engaged in the Kerr murder trial, and would be unable to give the matter any attention for probably two weeks. On May 3, a notice was served upon President Robison, there being no attorney of record, that the demurrer would be called up by plaintiff on Saturday, May 6, at 9:30, or as soon thereafter as counsel could be heard. At that time the clerk of T. J. Mahoney appeared and gave notice to the court that Mr. Mahoney had been employed and desired to appear, and it seems that nothing further was done on that day. On Wednesday, May 10, the demurrer was called up and overruled by the court, and the finding entered that it was filed for delay only, and the sum of \$10 for the benefit of plaintiff was taxed, as costs, against the defendant. Counsel admits that in tendering an answer, and asking leave to file it, he has waived any merely technical error in the petition or in the time and manner of overruling the demurrer. But it is insisted that his demurrer was good, and that the petition presented no cause of action. The basis of the claim is the failure on the part of plaintiff to plead speci-

fically the fulfillment of the condition as to good health at the time of the delivery of the policy. It is urged that section 128 of the Code of Civil Procedure, cited above, does not apply, for the reason that this is a condition precedent, not in the contract, but to be performed prior to its taking effect. As this condition is created by express stipulation in the contract, and would have no existence if it were not in the contract, and a part of it, we are not able to draw this distinction. As above indicated, the allegation that all conditions had been "performed and fulfilled" and "complied with" seems sufficient under the statute. No entry of leave to plead was made, and there would be no right to plead without leave so long as such finding remained unreversed upon the records. However, on May 17, 1899, the defendant filed an answer, and on June 1 plaintiff filed a motion to strike it out, because filed without leave of court, and without authority of law. This motion was sustained and defendant excepted. On June 3, defendant filed a motion for leave to refile the answer, supported by affidavits showing the foregoing state of facts. On June 12, defendant's motion for leave to answer was overruled, and defendant excepted. The court then proceeded, over defendant's objection, to take the proofs and rendered judgment in favor of plaintiff for \$2,112.71 and costs. On June 14, a motion was filed to vacate this judgment, because of error in refusing to strike from plaintiff's petition; because of error in overruling the motion to cause plaintiff to make her petition more specific; error in sustaining the motion to strike defendant's answer; error in calling up for disposition and overruling defendant's demurrer to plaintiff's petition; irregularity in the proceedings of the court; abuse of discretion in striking out defendant's answer; error in overruling the motion for leave to refile; irregularities in the hearing of the cause on June 12, and the entry of default on that date without notice to defendant, and in the absence of defendant's attorney after the court had been informed in open court that the attorney was employed in a trial in another court.

This motion was overruled, and the same grounds of error are alleged in this court.

In tendering an answer and asking leave to file it on June 3, the defendant must be held to have waived errors of form and procedure occurring prior to that time. The real question presented here is whether there was an abuse of discretion in refusing to allow defendant to file the answer presented. The only issue tendered by the answer was that the action on part of plaintiff was prematurely brought. The policy provides that the association shall within ninety days after receipt of evidence satisfactory to it of the death of the insured, pay to the beneficiary said sum insured, after deducting the balance of the current year's premiums, if any, and any indebtedness of the insured or beneficiary to the association. This is the only provision as to any delay. It is true that there are further provisions that it shall be the duty of the beneficiary to notify the association of the death, in writing, and furnish as soon as possible, on the blanks provided by the association, such proofs and affidavits as the executive committee may require in order to satisfactorily establish the facts as to the life and death of the insured and the legality of the claim against the association; and all matter so furnished to the association may at its option be used by it as evidence of the facts therein stated. This provision, however, seems to be in no way connected with the ninety-day clause by its terms, nor does it seem that it should be by its meaning. No complaint is made of any lack of proof of the death of the insured. The fact of such death is not denied, and is impliedly admitted in the answer. The ninety days were apparently provided for the purpose of enabling the defendant to procure these other additional proofs and showing, which it is made the duty of the beneficiary to furnish. The answer shows that after receiving plaintiff's proofs on July 13, they were retained without objection until October 13, ninety-two days, and then returned, with a requirement of affidavits from other physicians who had attended the deceased during the last year

of his life. It seems neither necessary nor proper to hold that after they are all furnished and complete, and the whole ninety days, after a sufficient proof of death had been furnished, have been employed in the getting of them, then a further truce of another ninety days should be required before any legal proceedings could be taken. It seems clear that no defense to this action was tendered in the answer, and that no prejudicial error appears in the refusal to permit it to be filed.

It remains, then, only to consider whether or not there was any prejudicial error in taking proofs and entering judgment when the motion for leave to file was overruled, or any abuse of discretion in so doing. Section 432 of the Code provides:

"If the taking of an account, or the proof of a fact, or the assessment of damages, be necessary to enable the court to pronounce judgment upon a failure to answer, or after a decision of an issue of law, the court may, with the assent of the party not in default, take the account, hear the proof, or assess the damages; or may, with the like assent, refer the same to a referee, master, or commissioner, or may direct the same to be ascertained or assessed by a jury," etc.

In this case, an issue of law had certainly been made and decided, and, on the overruling of the application to answer, the defendant was in default, and it was competent for the court to proceed to take the proofs and assess the damages. The complaint that the proceeding was without notice to the defendant is clearly without merit, as it was taken on the occasion of passing on defendant's own motion for leave to file, and in his presence. If, as we conclude, there was no error in refusing permission to file this answer, it seems equally clear that there was no error in proceeding, at the request of the plaintiff, and on plaintiff's waiving a jury, to assess the damages. The proof tendered was sufficient to warrant the action of the court, and it is recommended that the judgment be affirmed.

DAY, C., concurs. KIRKPATRICK, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

BANK OF MILLER ET AL. V. JAMES E. RICHMON.*

FILED MARCH 5, 1902. No. 10,303.

Commissioner's opinion, Department No. 1.

1. **Malicious Prosecution: PROBABLE CAUSE: PREVIOUS GOOD CHARACTER OF PLAINTIFF.** In an action for malicious prosecution of a criminal action, or for an offense which imputes moral turpitude or want of integrity, it is competent for the plaintiff, in making his case in chief, to show his previous good character as bearing directly upon the question of probable cause, where such reputation was known to the defendant, or was of such general notoriety that he will be presumed to have known it.
2. **Arrest in Civil Action: FORMAL DISCHARGE.** Where a person is charged with being about to leave the state for the purpose of avoiding an examination concerning his property, and is arrested under the provisions of section 535 of the Code of Civil Procedure, and brought before the county judge for examination, an order, made upon hearing, that there was not sufficient evidence to warrant the arrest of the accused, is sufficient to show the proceedings fully terminated so far as the question of malicious prosecution is concerned, although the record fails to show a formal discharge.
3. **Instruction: PROBABLE CAUSE: COURT.** The question as to what constitutes probable cause is a question for the court to determine, and not for the jury; that is, the court must determine, as a matter of law, whether the facts are of such a character as would warrant a man of ordinary prudence in filing a complaint. An instruction which leaves to the jury to determine not only the facts, but also whether these facts would constitute probable cause, is erroneous.

·ERROR from the district court for Buffalo county. Tried below before SULLIVAN, J. *Reversed.*

Willis L. Hand, for plaintiffs in error.

Norris Brown and Willis D. Oldham, contra.

*Rehearing allowed. Reversal adhered to.

DAY, C.

James E. Richmon brought this action in the district court of Buffalo county against the Bank of Miller and Nelson Maddox to recover damages for malicious prosecution. The trial resulted in a judgment in favor of the plaintiff for \$400, to review which the defendants have brought error to this court.

The petition alleged that on January 13, 1898, the defendants falsely, maliciously and without reasonable or probable cause, caused the plaintiff to be arrested under the provisions of section 535 of the Code of Civil Procedure, which provides for the arrest and detention of debtors about to leave the state to avoid an examination concerning their property until such time as the examination can be had. The answer admitted the filing of the affidavit and the arrest and detention of the plaintiff, but alleged that defendants acted upon sufficient and reliable information, which led them to believe, and they did believe, that plaintiff was about to leave the state for the purpose of defrauding his creditors and avoiding an examination concerning his property; that they acted in good faith and without malice, and upon the advice of counsel, to whom they had previously communicated all the facts.

A number of errors are assigned for a reversal of the judgment, some of which we deem it unnecessary to consider, as they are not likely to again arise upon another trial of the case. Upon the trial the plaintiff was permitted, over the objection of the defendants, to introduce evidence tending to show his good reputation in the community at the time of his arrest. This ruling of the court is one of the errors now complained of. In ordinary civil suits it is undoubtedly the rule that evidence of good character is not permissible in making out a case in chief, and the authorities are in conflict as to whether in actions for malicious prosecution of a criminal action the plaintiff may, in the first instance prove his good character. Some courts of high authority maintain the view that in actions

for malicious prosecution of a criminal action, the plaintiff may, in the first instance, prove his own good character as tending to show that the prosecution was without probable cause. In *McIntire v. Levering*, 148 Mass., 546, it is said: In an action for malicious prosecution plaintiff, in order to prove that the prosecution was without probable cause, may show his good reputation, known to the defendant when the prosecution was commenced. This view also finds support in the following cases: *Woodworth v. Mills*, 61 Wis., 44; *Israel v. Brooks*, 23 Ill., 575; *Miller v. Brown*, 3 Mo., 127 and *Blizzard v. Hays*, 46 Ind., 166. While it is true that every one is presumed to have a good character until the contrary is shown, and this presumption ordinarily saves the necessity of proof, yet when one is charged with crime, or with an act which imputes moral turpitude or want of integrity, he is not obliged to rest upon the legal presumptions in his favor, but may show, if he can, his good character. So, in an action for malicious prosecution, where the party is charged with a criminal act, or an offence involving moral turpitude or lack of integrity, the better rule, as it seems to us, is to permit the plaintiff, in making his case in chief, to show his previous good character, as bearing directly upon the question of probable cause, where it is shown that such reputation was known to the defendant, or was of such general notoriety that he will be presumed to have known it. In the case at bar the affidavit which formed the basis for the arrest, does not charge the plaintiff with the commission of a crime as the term is ordinarily understood, but does charge him with an offense which necessarily imputes a bad character for integrity and fair dealing. We think, therefore, that it was competent for the plaintiff to show that immediately prior to the commencement of the prosecution he bore a good reputation for honesty and fair dealing, which was known to the defendants, or which ought to have been known to them on account of the general knowledge in the community.

Another error, argued at some length, was that the al-

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leged malicious prosecution was not fully terminated at the date of the commencement of this action, and hence the present suit was prematurely brought. The record shows that upon the arrest of the plaintiff he was taken before the county judge for examination, and upon the hearing the county judge found that there was not sufficient evidence to warrant the arrest of the plaintiff; but the court thereafter proceeded with the examination, which disclosed that the plaintiff had \$18 in his possession, which the court ordered him to turn over to the defendant on its judgment, and in default of such payment to be committed to the sheriff. We think the proceedings were fully terminated, so far as the question of malicious prosecution is concerned, when the county judge made his order that there was not sufficient evidence to warrant the arrest of plaintiff, and that plaintiff was not about to leave the state. The order with reference to the payment of the money into court was an incident of the examination of the plaintiff under the statute, and not a part of his arrest and detention. Upon the same day of these proceedings before the county judge the present action was commenced, and, in order to show that all of the orders of the county court had been made before this action was instituted, one of the attorneys was called as a witness, and testified that the petition was not prepared or filed until after the decision of the county court. In this, we think, there was no error.

It is also urged that the proof does not sustain the allegations of the petition, because the petition states that the defendants charged the plaintiff with a crime, whereas the affidavit offered in evidence in proof of the charge shows that the plaintiff was not charged with a crime, but it was merely a charge that he was about to leave the state for the purpose of avoiding an examination concerning his property and to defraud his creditors. The petition, however, sets forth at length the affidavit upon which the plaintiff was arrested, and, while the acts complained of were not, in a technical sense, a crime, punishable by crim-

inal process, we think the petition having set forth the terms of the affidavit they were sufficiently pleaded to permit the affidavit to be offered in evidence. In one part of the petition the acts of the plaintiff were referred to as an "offense."

Another error complained of relates to certain instructions given by the court upon its own motion, one of which was as follows: "The defendant Maddox claims that he had information from others of facts and circumstances which caused him to believe the defendant [plaintiff] was about to leave the state to avoid examination as to the property he owned. It is for you to determine whether or not such information if he had the same, was sufficient to justify him in instituting the proceedings against the plaintiff. And in this connection you are instructed that the information that would justify the making of the complaint against another for the purpose of having him arrested, must be of such character and obtained from such sources that business men generally of ordinary care and prudence and discretion would feel authorized to act upon it under similar circumstances. If in this case the jury believe from the evidence that defendant made the alleged affidavit before the county judge for the arrest of the plaintiff and that he was arrested in consequence thereof, then it is a question of fact to be determined by the jury from the evidence whether the defendant when he made the complaint, acted upon such information as men of ordinary care and prudence would have felt justified in acting upon under like circumstances." It is the settled law of this state that the question as to what constitutes probable cause is a question for the court to determine, and not for the jury. Where the facts are undisputed, the court must say whether or not there was probable cause; that is, the court must determine as a matter of law whether the facts are of such a character as would warrant a man of ordinary care and prudence in filing a complaint. The province of the jury is to determine whether certain alleged facts exist, but the court must determine the sufficiency of these

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facts to constitute probable cause. In an action for malicious prosecution, where the facts are disputed, the jury is to determine what the facts are; the sufficiency of the facts to constitute probable cause is for the court. Such is the holding in *Jonasen v. Kennedy*, 39 Nebr., 313. The instruction here complained of leaves to the jury to determine not only the facts, but also whether those facts would constitute probable cause. There was no other instruction in which the court informed the jury what facts would constitute probable cause. In this instruction, we think, there was error.

We therefore recommend that the judgment be reversed and the cause remanded for further proceedings.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

NOTE.—The character and reputation of the defendant for chastity and virtue is not at issue in an action of bastardy. *Stoppert v. Nierle*, 45 Nebr., 105; *Houser v. State*, 93 Ind., 228; *Low v. Mitchell*, 18 Me., 372, 375. The general character is not regarded as put in issue by one unlawful or fraudulent act. *Low v. Mitchell*, *supra*; *Attorney General v. Bowman*, 2 B. & P. [Eng.], 532, note a; *Nash v. Gilkeson*, 5 S. & R. [Pa.], 352. Evidence of good character not admissible in civil suit for maliciously burning plaintiff's wheat stacks. *Barton v. Thompson*, 56 Ia., 571. Different rule in action for libel and slander. See Townsend, Libel and Slander.—REPORTER.

ALBION MILLING COMPANY V. FIRST NATIONAL BANK OF
WEEPING WATER ET AL.

FILED MARCH 5, 1902. No. 11,293.

Commissioner's opinion, Department No. 2.

1. Brief: ARGUMENT: INSTRUCTIONS: ASSIGNMENT OF ERROR: CONSIDERATION. Where, in an argument and brief, error is assigned for giving and refusing a group of instructions and no reason

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is pointed out, or authorities cited, by or from which the court can determine the several questions involved in the assignment, the matter should receive no consideration.

2. **Faulty Answer: REPLY: REQUEST FOR INSTRUCTION: REFUSAL.**

Where an answer is faulty, but is replied to and treated by the plaintiff as sufficient during the whole trial and proceedings, the court should refuse to instruct the jury, at plaintiff's request, that certain of the facts alleged in the petition were not denied by such answer.

3. **Financial Worth: HONEST OPINION: LIABILITY.** Where one gives an honest opinion as to the financial worth and standing of a third party, and as to whether or not such third party is entitled to credit, based on information, which information he imparts to the person making the inquiry at the time such opinion is given, the mere fact that he was mistaken in his opinion will not make him liable in an action for fraud and deceit, to one who acts thereon.

4. **Verdict.** Where it is clear, from the law and the evidence, that the verdict returned by the jury is the only one which can be sustained in the case, it will not be set aside for errors occurring at the trial.

ERROR from the district court for Cass county. Tried below before RAMSEY, J. *Affirmed.*

Nelson C. Pratt, for plaintiff in error

J. E. Douglass, *contra.*

BARNES, C.

This action was commenced in the district court of Cass county by the plaintiff herein against the defendants for fraud and deceit alleged to have been practiced upon it by defendants, by making false statements in regard to the business character, financial standing, and responsibility of a third party, to wit, one S. M. Prouty, who was engaged in selling flour and other milling products in the village of Weeping Water, Cass county, Nebraska, and also as to the advisability of extending credit to him. The petition was in the usual form, and the facts stated therein, if true, were sufficient to constitute a cause of action. The answer of the defendants, though not closely or carefully

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drawn, or couched in apt legal phrase, in substance denied the material allegations of the plaintiff's petition. To this answer the plaintiff filed a reply. The case was duly tried and the jury returned a verdict for the defendants. A motion for a new trial was overruled, judgment was entered for the defendants upon the verdict, and plaintiff brings the case to this court by petition in error.

The only evidence offered by the plaintiff in support of the allegations of its petition, as to the false and fraudulent representations complained of, was given by one Mr. Elliott. After testifying that he had received a letter from Mr. Prouty stating that he, Prouty, wished to handle the plaintiff's milling products, and would like credit in the transaction for about \$500, the witness was interrogated and further testified as follows:

Q. You may state what, if anything, you did after you received that letter, Mr. Elliott.

A. I called up the First National Bank of Weeping Water,—called the central office, and asked for the president or cashier of the First National Bank. She called back and said that the president was out, but the cashier was there, and had a talk with him. I told him that Mr. Prouty had been talking with us about buying some flour, and asked the First National Bank,—or, rather, the cashier,—and asked him what he knew; and he said he had been there for some time in business; he seemed to be doing well himself, and they kept his account there at the bank; that he asked them for no funds; as so far as he knew he was getting along nicely. He then asked me about what the probable amount would be. I told him about \$500, and he said "Yes; I should say he would be good for that amount easily"; he didn't owe them anything.

This conversation over the telephone was claimed to have taken place on the 28th day of October, 1896. Defendant Murtey, the other party to the conversation, testified for the defendant, substantially as follows:

Q. What did the party talking over your phone say to you?

A. He said he had an order from Mr. Prouty, and he wanted to know what I thought about it.

Q. What question did he ask?

A. He wanted his standing in a general way,—financial standing.

Q. What did you tell him?

A. I told him he had been meeting his bills; that he had dealt with us some time and he owed us nothing; that he seemed to be honest, as far as I could say,—straightforward.

Q. What else did you tell him?

A. I think I asked him what was the amount of his shipment, and I think he said about \$500,—something of that sort.

Q. What did you say to him?

A. I told him that probably he might be good for that, I wasn't certain about it, however.

This was all the evidence of any kind that was introduced upon the trial in relation to the alleged representations and statements made by the defendants, or any of them, to the plaintiff, as to the financial standing of Mr. Prouty. Further on the witness testified that Mr. Prouty had an account at that time at the bank; that it was not overdrawn; that he was not indebted to the bank anything at all; that he had heard no objections to Prouty's dealings; that he had paid his bills so far as he knew, and there had been no pending claims against him up to that time, to the bank, to his knowledge; that he had paid for everything, so far as he knew. The credit was finally given to Prouty on the last days of January and the first days of February, 1897. This evidence is quoted in full in order that a clear understanding may be had of the questions hereinafter determined.

1. The first assignments of error set forth in the plaintiff's brief are under the head of "Instructions," and are as follows: "Instruction No. 3, given by the court on its own motion, and in particular that portion which is as follows: 'But if it or its officer or officers attempted to give

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such information, then it or its officer or officers were bound under the law to give honest information, such as was within their knowledge,'—plaintiff contends is not a correct statement of the law; and likewise instruction No. 4, given by the court on its own motion, and instruction No. 1, requested by defendants and by the court given, and instruction No. 7, requested by the defendants and by the court given." We ought not to be required to consider this assignment. It has been frequently held that where error is assigned in the giving and refusing of a group of instructions, and one of them is proper the whole assignment of error fails. No reason is pointed out, and no authorities are cited by which we can determine whether the position taken by counsel is correct.

2. The next assignment of error is as follows: "The first, second and third instruction asked for by plaintiff should have been given." We decline to consider this assignment of error for the reasons given above. It is claimed, however, that by one of these paragraphs the court was asked to instruct the jury that the statements set forth in paragraph five of the petition were not denied. We have examined this question, and hold that the request was properly refused, for the reason that no demurrer was ever filed to the answer, no motion to make it more specific and certain was ever urged; no objection was offered at the trial that it did not state facts sufficient to constitute a defense, but, on the contrary, it was always treated as though every allegation contained in the petition was suitably denied. It was decided in the case of *Rosenbaum v. Russell*, 35 Nebr., 513, that an answer, although faulty, will be held to be sufficient when assailed for the first time by a motion for a new trial. We think that rule is applicable to the facts in this case.

3. Errors are assigned for the giving of other instructions tendered by the defendant, and the refusal to give those tendered by the plaintiff. All of these instructions were directed to the main question of the liability of the defendants. By the instructions asked for by plaintiff

the court was requested to instruct the jury that if the defendants made the representations set forth in the evidence without knowing whether their statements were true or not, and the plaintiff had relied thereon to its injury, it would be entitled to recover. The plaintiff has mistaken the law of this case. The statement made to its agent, Elliott, by the defendant Murtey, when they conversed together by telephone, taken in the light of all of the circumstances and interpreted by the plain import of its language, can not with reason be considered as anything more than a fair expression of his opinion of the financial condition and worth of Mr. Prouty. Indeed, from its very nature, it could not be anything else. In the conversation Murtey gave Elliott all of the information on that subject which he had himself, and on which his opinion was based; and the plaintiff thereafter was as well able to form an opinion as to the advisability of extending credit to Prouty as was defendant Murtey, and these statements in no way rendered him liable to the plaintiff in an action for fraud and deceit. *Tryon v. Whitmarsh*, 1 Met. [Mass.], 1; *Marsh v. Falker*, 40 N. Y., 562; *Meyer v. Amidon*, 45 N. Y., 169; *Cowley v. Smyth*, 50 Am. Rep. [N. J.], 432. In the case of *Tryon v. Whitmarsh*, *supra*, which was an action for false and fraudulent representations as to the credit of third persons, whereby the plaintiffs were induced to give them credit, a verdict for the plaintiff was set aside for the reason that the judge should have instructed the jury that the defendants would not be liable, if they were of the opinion, from the evidence, that he gave an honest opinion, and believed that the persons recommended were trustworthy. The plaintiff's own evidence in this case, therefore, would not sustain a verdict in its favor and against Murtey. As to the defendant bank, the evidence fails to show that it ever had any interest in or anything to do with the matter in its corporate capacity. Indeed, it is doubtful if, under its charter powers, it could take any such part in the transaction as would create liability on its part. As to the defendant Louis Foltz, who

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is described as the president of the bank, the evidence shows conclusively that he never knew anything about the transaction until more than three months after it took place, and after he had loaned Prouty some of his own money, and had taken a mortgage and a bill of sale to secure its repayment.

Therefore the evidence of the plaintiff was not sufficient to sustain a verdict against any of the defendants, and the court did not err in refusing the instructions asked for by the plaintiff. We are not called upon to examine any of the other assignments of error, and we recommend that the judgment of the district court be affirmed.

POUND, C, concurs.

OLDHAM, C., concurring.

I prefer to express no opinion on what is said in support of the first and second paragraph of syllabus, but I concur in the result for the reason that it is clear to my mind that the evidence contained in the record is not sufficient to sustain a judgment against any of the defendants. I think that the trial court would have been justified, at the close of plaintiff's evidence, in directing a verdict for the defendants.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

PETER HALMES, APPELLEE, v. GEORGE E. DOVEY ET AL., APPELLANTS.

FILED MARCH 5, 1902. No. 11,144.

Commissioner's opinion, Department No. 2.

1. **Judgment Creditor: JUDGMENT: EXECUTION.** The right of a judgment creditor to take out an execution on his judgment, is a substantial right; and this right can only be taken away or suspended by some act, suit or proceeding for this purpose in compliance with law.

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2. **Judgment Lien: STATUTE: EXECUTION.** A judgment lien is created by statute, and is destroyed by statute if its provisions requiring the taking out of an execution are not complied with.
3. **Dormant Judgment: REVIVOR: LIEN.** When a dormant judgment is revived, it will operate as a lien only on the real estate which the judgment debtor may own at the time of the revivor.

APPEAL from the district court for Cass county. Heard below before RAMSEY, J. *Affirmed.*

A. N. Sullivan, for appellants.

Byron Clark and C. A. Rawls, contra.

OLDHAM, C.

This action was begun in the district court of Cass county on the 13th day of August, 1898, by Peter Halmes, for the purpose of restraining the sheriff of Cass county from levying an execution on certain real estate belonging to said Halmes. George E. Dovey, the judgment creditor, was also made a party defendant. The material facts, as appear by the record, are that on April 9, 1888, said George E. Dovey recovered a judgment in the district court of Cass county against one Thomas for the sum of \$1,780.95. At the time of the rendition of the judgment, Thomas was the owner of the real estate involved in this controversy, but conveyed the same by deed to one Nicholas Halmes on July 17, 1888. On July 21, 1888, Dovey took out an execution on this judgment, and levied on some personalty, but did not levy on the real estate. On July 9, 1891, an alias execution was issued, on which, according to the testimony of the clerk of the court, there was made no return thereof. These were the only executions issued on this judgment until July 7, 1898, when the execution was issued which is the subject of this action. In the meantime, viz., on or about June 16, 1898, Dovey procured a revivor of this judgment, which, according to his own theory, had become dormant. The petition alleges and the evidence shows that on July 14, 1896, said Peter Halmes acquired the legal title

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to this real estate by a deeded conveyance from Nicholas Halmes. In fact, this is conceded; but Dovey claims that by reason of the fact that there was a suit begun on April 3, 1893, by said Nicholas Halmes against said Dovey for specific performance of an alleged contract concerning this land, which suit was not terminated until April 15, 1898, that his right to issue execution was suspended during the pendency of this action, and that the judgment did not become dormant in fact, and he had not, therefore, lost his judgment lien on said land. This contention was tried, and the court found in favor of Halmes and rendered a decree perpetually enjoining the levy of an execution on said lands to satisfy said judgment. From this decree, Dovey appeals to this court.

The main question presented, then, is, was the right of Dovey to take out an execution on his judgment against Thomas suspended during the pendency of the action for specific performance brought by Nicholas Halmes against Dovey? In that suit Thomas was not a party. The validity of the judgment of Dovey against Thomas was not assailed. Dovey was not restrained from taking out an execution. There was no attempt made by this action to prevent Dovey from collecting his judgment from Thomas. The object of the suit was for the sole purpose of compelling Dovey to release his judgment lien on this land by reason of an alleged contract to do so. It was heard by the district court for Cass county, and a decree was rendered therein by the court on September 4, 1894, dismissing the petition of Nicholas Halmes "for want of equity and a failure to prove allegations therein." It was appealed to this court, but the record fails to show any supersedeas bond. So whatever may have been its effect before trial, it is certain that after the date of the trial Dovey was not embarrassed in any way by its pendency. The right to have an execution issued is a valuable right, for this is the only means provided by law to enforce the judgment. This right can only be taken away by some act done in compliance with law. It can never be taken away by anything

less. Neither can the failure to take out an execution be excused on the ground that the judgment creditor believed that his right thereto was suspended, unless by law it actually was suspended. From the statement of the above facts, it is clearly apparent that Dovey at all times had the right to take out an execution on his judgment against Thomas, and that the right to do so was not suspended by that action.

It is suggested by counsel for Dovey that there was an execution issued on March 25, 1893, which should be considered. On an examination of the execution, we find that it recites that George E. Dovey is the plaintiff, and the same Thomas defendant, but it purports to be issued on a judgment obtained on December 31, 1892, for the sum of \$1,308.47. It is obvious that this execution was not issued on the judgment involved in this controversy. Among the requisites of a valid execution, as laid down by Mr. Herman, section 55, are that it must state the name of the court from which it was issued, the name of the county wherein the judgment was rendered, the amount of the judgment, and the time of its rendition. But however this may be, the record shows that more than five years had elapsed from the date of this execution at the time of the revivor. The judgment lien is created by statute, and is destroyed by statute if an execution thereon is not taken out within five years from the date of the judgment, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of taking out of another execution thereon. If execution is not taken out in the time limited by the statute, the judgment becomes dormant, and the judgment lien is destroyed. This dormant judgment may be revived, but when so revived it will operate as a lien only on the real estate which the judgment debtor may own at the time of the revivor. Hence we conclude that the lands of Peter Halmes, as set forth in this petition, are not subject to a judgment lien, and are not holden for the payment of this judgment, and that the decree of the court below is clearly right and should be affirmed.

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We recommend that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ALLEN H. CARPENTER V. CITY OF RED CLOUD.

FILED MARCH 5, 1902. No. 11,314.

Commissioner's opinion, Department No. 2.

1. **Damages: INADEQUATE VERDICT.** In an action for damages for injuries to the person and property of the plaintiff, where the testimony clearly shows that plaintiff has sustained substantial damages to both person and property, a judgment for \$1 damages will be set aside as grossly inadequate.
2. **New Trial: SMALLNESS OF DAMAGES: QUERE.** Whether, in an action for injuries to the person, a new trial may not be granted on account of the "smallness of damages," where the testimony clearly shows that the damages awarded are grossly inadequate as compensation for the pecuniary injuries actually sustained, *quere*.
3. **Instructions: ADMISSION OF TESTIMONY: CRITICISM.** Conduct of the court in the giving of instructions and the admission of testimony criticised.

ERROR from the district court for Webster county.
Tried below before BEALL, J. *Reversed*.

P. A. Wells and S. A. Searle, for plaintiff in error.

George R. Chaney and J. R. Mercer; contra.

OLDHAM, C.

This was an action by the plaintiff against the defendant, the city of Red Cloud, Nebraska, for injuries to the person and property of the plaintiff. The injuries are alleged to have been occasioned by the negligence of the de-

defendant city in digging a ditch across one of its streets, and leaving it entirely unprotected so that, as the petition alleges, the plaintiff, while driving with his team and buggy along defendant's street, drove into the ditch, and, as a result of the accident, killed one of his horses, crippled the other by breaking its foreleg, thereby entirely destroying its value, injured his buggy materially, and was himself thrown violently to the ground and received serious and permanent bodily injuries. Defendant answered this petition by alleging that the injury was occasioned by the contributory negligence of the plaintiff. The testimony on the part of plaintiff clearly showed that he had actually received serious and permanent bodily injuries as a result of the accident. It also showed that before the injury he was an able-bodied man, thirty-nine years of age, and was earning by his labor \$1.50 per day, and that as a result of the injury he had been for about a year unable to earn anything by manual labor. The evidence also showed that he had expended about \$30 for medical services and attendance on account of his injuries. The testimony as to the extent of plaintiff's injuries was not seriously disputed by the defendant. The only direct effort made to discredit the extent of his injury was an attempt to show that plaintiff owned only a one-half interest in the team that was destroyed. The jury returned a verdict for the plaintiff, and assessed his damages at one dollar. There was judgment on the verdict, and plaintiff brings error to this court.

Numerous errors are alleged in the proceedings of the court in the trial below, both in the admission of testimony and in the giving of instructions; and, while we think that most of the allegations of error are well assigned, yet, in view of the conclusion which we shall reach, it will be necessary to examine only one of these allegations, and that is that the judgment is contrary to the evidence and that the damages assessed are grossly inadequate.

It is urged by counsel for defendant that in view of section 315 of the Code of Civil Procedure, which provides

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that "A new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, nor any other action where the damages shall equal the actual pecuniary injury sustained," we are precluded from granting a new trial in this case on account of the "smallness of damages." The first clause of this section of the statute applies only to actions for an injury to the person or reputation, and in the case at bar the action was for injuries to both person and property, and the testimony as to the injury to the property alone in this case shows a damage far in excess of the amount awarded. We are aware of the fact that in the case of *Shoff v. Wells*, 1 Nebr., 168, section 315, *supra*, was held to effectually prohibit a new trial in an action for injuries to the person on account of the "smallness of the damages," even though the damages assessed did not equal the actual pecuniary injury sustained. But in the later case of *Ellsworth v. City of Fairbury*, 41 Nebr., 881, this court, while not specifically referring to the above case, either modified, overruled or ignored its construction of section 315, *supra*, and set aside a judgment for \$100 in an action for personal injuries, because under the testimony, it was grossly inadequate as compensation for the actual pecuniary loss sustained by the plaintiff. In view of the rule announced in this later case, even though the case at bar had been an action for injuries to the person alone, under the undisputed testimony as to the actual pecuniary injuries sustained we would still feel it our duty to set aside this judgment as grossly inadequate. If the reasonable, humane and liberal interpretation given to section 315 of the Code of Civil Procedure in *Ellsworth v. City of Fairbury*, *supra*, is to be followed as an established rule of construction by this court, why should not so much of the opinion in *Shoff v. Wells* as is in conflict with this doctrine be overruled?

As this case must be tried again, we think it well to suggest that paragraphs 3 and 4 of instructions given at the request of the defendant city at the former hearing are

each misleading and properly subject to criticism. We also think that the original method by which the testimony of defendant's witness Judson was procured outside of court during the progress of the trial, and without any notice, as required by law, having been served on the plaintiff, should not be followed during the next trial of this cause. We would also suggest that an instruction should be given on the proper measure of plaintiff's damage in case he should prevail. This was not done at the former trial, and while the court was not wholly at fault in this matter because no such instruction was requested by plaintiff's counsel, yet it seems reasonably certain that, if a proper instruction had been given on the measure of damages, it would, perhaps, have prevented the return of a verdict by the jury which was nothing less than a comic caricature of the damages actually proved.

We recommend that the judgment of the district court be reversed and the cause remanded.

BARNES and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

JOHN A. HORBACH, REVIVED IN THE NAME OF MARY A.
BOURKE, v. MATILDA J. BOYD ET AL.

FILED MARCH 5, 1902. No. 11,105.

Commissioner's opinion, Department No. 2.

1. **Rejecting Evidence: DIRECTING VERDICT.** Where the trial court rejects all the evidence offered by a party and directs a verdict for his adversary, in determining the admissibility of the evidence offered, a reviewing court will give such party the benefit of all inferences that might be drawn reasonably from the testimony received.

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2. **Tender of Proof: CONSTRUCTION.** An offer of proof, not put in a deceptive manner nor in language calculated to mislead, which is fairly susceptible of a construction rendering the evidence admissible, should be so construed, although a different construction might be put upon it, where it clearly appears from the record that the trial court did not proceed upon a correct theory in rejecting it.
3. **Vacant Lands: HOLDER OF LEGAL TITLE: POSSESSION.** The holder of the legal title to vacant lands is deemed to be in possession thereof.
4. **Grantor: POSSESSION: PRESUMPTION.** Where a grantor remains in possession after a valid conveyance, his possession is presumed to be permissive and subordinate to the grantee.
5. **Quaere.** In such case, *quaere* whether he can claim that his continued possession was adverse without showing actual notice to the grantee.
6. **Deed: GRANTOR: COVENANT OF WARRANTY: SUBSEQUENT ADVERSE TITLE: ESTOPPEL.** A grantor in a deed with covenant of warranty may acquire a new title, adverse to that of his grantee, by a subsequent entry and adverse possession, and is not estopped from asserting the same by his deed and covenant.
7. **Entry: ADVERSE POSSESSION: PRESUMPTION.** If the grantor subsequently makes an entry upon the possession of the grantee, there is no presumption that the new possession so acquired is permissive or subordinate to the grantee, and a new title may be established by open and notorious adverse possession as in other cases.

ERROR from the district court for Douglas county.
Tried below before SCOTT, J. *Reversed.*

Hamilton & Maxwell, for plaintiff in error.

Baldrige & De Bord and *Connell & Ives*, *contra.*

POUND, C.

This is an action in ejectment by the heirs of Joseph L. Boyd, deceased, to recover certain lots in the city of Omaha. The answer is a general denial and a plea of adverse possession and the statute of limitations. The plaintiffs' case is that in 1857 their ancestor purchased the lots in controversy of John A. Horbach, whose grantee is plaintiff in error; that the purchaser left Omaha soon after, and

died in 1862; and that a warranty deed was duly executed by Horbach, and by him placed of record in the proper office, pursuant to an arrangement or understanding at the time of the purchase. The defendant sought to prove that in 1861 Horbach inclosed the lots and other property with a substantial fence and from that date until 1887 he or his grantee continuously, openly and notoriously were in adverse possession, using the land for a garden; that in 1876 he sold and conveyed it to one Abraham Horbach by warranty deed duly executed, delivered and recorded; that said Abraham Horbach took possession thereunder, and himself or his grantees have been in the continuous, open, notorious and exclusive adverse possession thereof as owners ever since; and that in 1887 such grantees of Abraham Horbach or occupants under them placed a number of buildings upon the premises. All of defendant's offers to prove these facts were rejected by the trial court on the ground that Horbach and those claiming under him were estopped by his deed and covenant and that no actual notice of Horbach's possession and claim of ownership was brought home to said Boyd or his heirs, and a verdict for the plaintiff was directed.

We think it manifest that, in passing upon the admissibility of the evidence offered, this court should give the defendant the benefit of all inferences that may be drawn reasonably from the testimony received. We think, also, that as the offers of proof are not put in a deceptive manner nor in language calculated to mislead, and are fairly susceptible of a construction rendering the evidence proffered admissible, they should be so construed, although a different construction might be put upon them, since the trial judge, in his reasons, expressly stated in the record repeatedly, failed to make an important distinction, and rejected them upon an unsound theory. Ordinarily, every presumption is in favor of the rulings of the trial court, and the record will be so read as to sustain its action, if possible. But where a party is prevented from presenting his case all inferences are to be drawn in his favor that

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the record will reasonably permit, and this should be the more true where it is evident that the offers to prove his case would have been rejected, under the theory taken by the trial court, had counsel phrased his offers so as to bring them unmistakably within the view taken by this court. While no one says, in so many words, that the land was vacant at the time of the conveyance, in 1857, such is the fair and almost necessary inference from the evidence admitted. One witness, who went over and surveyed the tract of which the property is a part in 1863, says that he found nothing but a fence, which defendant offered to prove was put there by Horbach in 1861. Several other witnesses testify that the whole tract was "open" as late as 1877, and used as a garden. Moreover, defendant's offer to prove that Horbach inclosed these lots in 1861 and has since occupied them continuously as owner, implies that they were previously vacant. We think, also, that the fair construction of defendant's offers of proof is not that Horbach remained in possession after the deed to Boyd continuously, and seeks to make such possession adverse, but that in 1861, four years after the conveyance, Horbach entered on the land, inclosed it and occupied it, and that he and his grantees have occupied it adversely and claimed to own it, ever since. It must follow that the evidence should have been received.

The holder of the legal title to vacant lands is deemed to be in possession thereof. *Troxell v. Johnson*, 52 Nebr., 46. Hence, when Horbach executed and delivered a deed to Boyd which conveyed the legal title, possession went with it. The land being vacant, the same act that divested Horbach's title and created a title in Boyd, terminated Horbach's possession, and put Boyd in possession. Such possession, as we understand defendant's claim, continued for four years. Then, in 1861, as defendant offered to prove, Horbach inclosed the land and other tracts with a substantial fence; he and his lessees cultivated it; he publicly and notoriously claimed to own it, and was named as owner on maps and plats in general circulation; the land

was assessed as his; he conveyed it, and he and his grantees and lessees put houses upon it. This is not a continuance of the possession existing prior to the conveyance. It is a subsequent entry, creating a new and independent possession, and giving rise to a new and original title. We have no doubt that, where a grantor remains in possession after a valid conveyance, his possession is presumed to be permissive and subordinate to the grantee. *Humphrey v. Hurd*, 29 Mich., 44; *Schwallback v. Chicago, M. & St. P. R. Co.*, 69 Wis., 292, 34 N. W. Rep., 128. In such case, in order that the possession be treated as adverse to the grantee, there must be strong proof to overcome this presumption. It has been said, generally, that the grantor who continues in possession must make an "explicit disclaimer" of subserviency to the grantee; that this disclaimer must be "clear, unequivocal and notorious"; and that his possession becomes adverse only upon a "notorious assertion of right in himself." *McCormick v. Herndon*, 86 Wis., 449, 56 N. W. Rep., 1097, 1098; *Sherman v. Kane*, 86 N. Y., 57, 68; *Burhans v. Van Zandt*, 7 Barb. [N. Y.], 91. In any ordinary case, the acts of Horbach in conveying the land, causing himself to be named as owner upon maps and plats, and openly and publicly claiming it as his own, would amply suffice. Even in case of a deed absolute by way of mortgage, where there is a certain fiduciary relation, this court has held that acts of ownership after payment of the debt secured, of themselves, justify a finding that the possession of the creditor is adverse. *Stall v. Jones*, 47 Nebr., 706. Counsel have argued, however, that between grantor and grantee, where the grantor continues in possession, the same rule applies as in cases of landlord and tenant, tenants in common, and the like, in which cases the possession does not become adverse until notice of the adverse claim is brought home to the other party. *Shields v. Horbach*, 49 Nebr., 262; *Ross v. McManigal*, 61 Nebr., 90; *Smith v. Hitchcock*, 38 Nebr., 104. There is much to be found in the books in support of this contention. But we do not find it necessary

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to pass on the question in this case, nor to decide whether a long continued course of open, notorious and unequivocal acts of ownership, such as the defendant offered to show in the case at bar, would not suffice to rebut the presumption of a permissive occupancy, without proof of further actual notice to the grantee in person. For if the defendant's case is that a new entry was made four years after the conveyance, and a new possession began from that entry, an entirely different case is presented, to which the rules relied upon by the trial judge, assuming them to govern a case of continued possession after the conveyance in all the stringency contended for, have no application. It can not be doubted that a grantor who has conveyed by deed with covenant of warranty, may acquire a new title adverse to that of his grantee by a subsequent entry and adverse possession, and is not estopped from asserting the same by his deed and covenant. *Stearns v. Hendersass*, 9 Cush. [Mass.], 497; *Sherman v. Kane*, 86 N. Y., 57; *Eddleman v. Carpenter*, 7 Jones Law [N. Car.], 616; *Hines v. Robinson*, 57 Me., 324; *Cramer v. Benton*, 64 Barb. [N. Y.], 522. It must be evident that, if the grantor subsequently makes an entry upon the possession of the grantee, there is no presumption that the new possession so acquired is permissive or subordinate to the grantee. This would be the more obvious where several years intervene between the grant and the entry. Whatever the rule may be where the possession of the grantor continues after the conveyance, in such a case the new title may be established by proof of open and notorious adverse possession, as in other cases.

We are of opinion, therefore, that the court should have received the evidence offered, and that a new trial should be had, at which the condition of the land when conveyed and the date when Horbach took actual possession will doubtless be shown fully and explicitly. To that end we recommend that the judgment be reversed and the cause remanded.

BARNES and OLDHAM, CC., concur.

Doane v. Dunham.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

SAMUEL DOANE, APPELLANT, v. ELLEN DUNHAM ET AL.,
APPELLEES.

FILED MARCH 5, 1902. No. 11,273.

Commissioner's opinion, Department No. 2.

1. **Preponderance of Evidence.** While proof by a preponderance of the evidence is all that is required of the plaintiff in any civil action, when a plaintiff seeks to overcome the presumption arising from the express terms of a conveyance and from the relations of the parties concerned therein, by parol evidence, much more certainty and conclusiveness are required than in ordinary cases.
2. **Parol Evidence: RESULTING TRUST.** Parol evidence to establish a resulting trust, must be clear, unequivocal and convincing.
3. **Husband and Wife: GIFT: PRESUMPTION.** Where a husband places the title to lands in his wife without consideration, whether by conveyance directly or by procuring conveyance to her by others, a gift is presumed.

APPEAL from the district court for Nuckolls county.
Heard below before HASTINGS, J. *Affirmed.*

W. A. Bergstresser, Jefferson H. Broady and Isham
Reavis, for appellant.

S. W. Christy and Cole & Brown, *contra.*

POUND, C.

This action was brought to declare a resulting trust in certain lands alleged to have been purchased by appellant and conveyed by his direction to Sylvia A. Doane, his wife, now deceased, whose heirs at law are defendants and ap-

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pellees. The district court found for the defendants as to the subject-matter of the present appeal, and decreed accordingly.

In our view, but one question is presented, namely, whether the decree is sustained by the evidence. Counsel have argued that the pleadings make a narrower issue than the existence or non-existence of a trust, and merely raise the question whether appellant or his wife paid the purchase money. But although the answer alleges that the wife furnished the funds, there is also a general denial, under which the court might properly find an absolute gift by the husband. It is undoubtedly true that proof of an issue by a preponderance of the evidence is all that is required of a plaintiff in any civil action. *Stall v. Jones*, 47 Nebr., 706; *Wylie v. Charlton*, 43 Nebr., 840; *Southard v. Curley*, 134 N. Y., 148. But this is not a fixed or unvarying standard. What would be sufficient to constitute a preponderance of the evidence and to sustain a judgment in an ordinary case might not suffice in another, where, in addition to the burden resting upon the plaintiff in any case, particular presumptions are to be overcome. This is especially true where a plaintiff seeks by parol evidence to overcome the presumptions arising from the express terms of a conveyance, or from the relations of the parties concerned therein. It is obvious that what would ordinarily suffice may fall far short of the requisite *quantum* of proof in such a case, without in any degree infringing the general rule that only a preponderance of the evidence is demanded. In consequence, while we may not admit the statements often to be seen in the books, that more than a preponderance of the evidence is required to establish a trust, contrary to the purport of a written instrument, by parol, and that the trust in such cases must be proved beyond doubt, there is no occasion to repudiate or to qualify what has become a commonplace of the books, that the proof in such cases must be clear, unequivocal and convincing. 2 Pomeroy, Equity Jurisprudence, sec. 1040; 1 Beach, Trusts, sec. 172; *Schade v. Bessinger*, 3

Nebr., 141, 144; *Deroin v. Jennings*, 4 Nebr., 97; *Names v. Names*, 48 Nebr., 701; *Klamp v. Klamp*, 51 Nebr., 17; *Vecder v. McKinley-Lanning Loan & Trust Co.*, 61 Nebr., 892. The very terms of the conveyance are evidence, and must be overcome. Hence much more certainty and conclusiveness are requisite than in ordinary cases. Indeed, it has been said that "Proof of trusts by parol is not regarded with favor by the courts." 2 Jones, Evidence, sec. 425. In the case at bar, moreover, appellant's burden was increased by the presumption which arises in any case where a husband places the title to lands in his wife without consideration. Whether this is done by direct conveyance, or by procuring a conveyance to her by others, can make no difference. In either event a gift is presumed. *Kobary v. Greeder*, 51 Nebr., 365; *Vecder v. McKinley-Lanning Loan & Trust Co.*, *supra*. The district court found that appellant intended his wife to take the full beneficial interest. If, as there is much to indicate, he acted under a mistake of law in supposing that on his wife's death the property would pass to his daughter by a former wife, and not to collateral relations of the grantee, yet such mistake did not and does not constitute any legal ground for withdrawing his completed gift. Neither does it authorize us to impress the property with a trust which the parties themselves did not create.

We recommend that the decree be affirmed.

BARNES and OLDHAM, CC., concur.

By the court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

Houston v. Farmers & Merchants' Ins. Co.

M. H. HOUSTON ET AL. V. FARMERS & MERCHANTS' INSURANCE COMPANY.

FILED MARCH 5, 1902. No. 11,266.

Commissioner's opinion, Department No. 3.

1. **Insurance: PREMIUM: CREDIT: SUSPENSION OF POLICY.** Where credit is extended and a note taken for the premium to be paid for a policy of insurance, and both the note and the insurance policy provide that in case the note is not paid at maturity the policy shall be suspended, inoperative and of no force or effect so long as the note or any part thereof remains due and unpaid, the insurance company can not be held liable for a loss occurring after the maturity of the note and while the same is unpaid.
2. ———: **CONDITION IN POLICY.** The policy contained a further provision to the effect that "in case of any loss of said property, either partial or total, while said note, or any part thereof, remains overdue and unpaid, this company shall not be liable for such loss, nor shall the payment of said note or the receiving or retention of the proceeds, or any part thereof, by this company, render it liable for any loss occurring while said note, or any part thereof, remains due and unpaid; nor shall such payment or retention be construed to be a waiver of any condition in this policy or application. The payment of the premium, however, revives this policy and reinstates the same for the remainder of the term." *Held*, that the collection of the premium after a loss by the insured, which occurred after the maturity of the note, and while the same was unpaid, while it would reinstate the policy for the remainder of the term, would not constitute a waiver on the part of the company such as to make it liable for the loss.

ERROR from the district court for Pawnee county. Tried below before LETTON, J. *Affirmed*.

Story & Story, for plaintiffs in error.

Halleck F. Rose and Frank A. Barton, contra.

DUFFIE, C.

January 10, 1895, the defendant in error issued to the plaintiff in error a policy of insurance to run five years, taking a note maturing December 1, 1895, for the premium.

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The policy insured the plaintiff on his dwelling-house in the sum of \$500 and on his barn in the sum of \$1,000 against loss by fire and tornadoes. The note contained the following provision: "And it is hereby agreed that the company shall not be liable for any loss or damage that may occur to the property insured while this note, or any part thereof, shall be overdue and unpaid." The policy also contained these conditions: "If a note be given for the premium on this policy, or any part thereof, it is mutually agreed and understood by and between the assured and this company, that in case said note, or any part thereof, be not paid at maturity, this policy shall be suspended, inoperative, and of no force or effect so long as such note, or any part thereof, remains overdue and unpaid. And in case of any loss of said property, either partial or total, while said note, or any part thereof, remains overdue and unpaid, this company shall not be liable for such loss, nor shall the payment of said note or the receiving or retention of the proceeds, or any part thereof, by this company, render it liable for any loss occurring while said note, or any part thereof, remained overdue and unpaid; nor shall such payment or retention be construed to be a waiver of any condition in this policy or application. The payment of the premium, however, revives this policy and reinstates the same for the remainder of its term only." On May 17, 1896, after the maturity of the note, which was still wholly unpaid, the plaintiff's barn was injured by a wind-storm to the amount of \$600. The company was informed of this loss, but no proof of loss was made, and no further action taken in relation thereto. After the loss the company demanded payment of the premium note, and on September 23, 1897, brought suit thereon before the county judge of Pawnee county. After suit brought, the plaintiff in error offered to confess judgment for \$26 and costs, that amount being, as plaintiff in error claims, the customary short-rate premium on the policy up to the time that his barn was injured by a wind-storm, which offer was refused by the company. Plaintiff in error thereupon filed his bill of

particulars, claiming \$575, being the amount he claimed due him on account of damage to his barn after giving the company credit for the full amount of the premium note. The company moved to strike this answer from the files for the reason that the court was without jurisdiction, whereupon the plaintiff in error amended by reducing the amount of his claim to \$200, and the motion to strike was thereupon overruled. On a trial in the county court, judgment went against the insured for \$37.63, the full amount due upon the premium note, and he thereupon appealed to the district court. In the district court the insured filed an answer setting up his policy and the loss thereunder, and asking judgment against the company for \$565, the amount of his loss less the amount of the premium note which he admitted as an offset to his claim for damages. This answer was stricken from the files on the ground that the jurisdiction of the court below was limited to \$200; whereupon, the insured filed an amended answer asking for judgment on the policy in the sum of \$200 only, and attorney's fees and costs. The company demurred to so much of the answer as set out a claim for damage under the policy, and this demurrer was sustained by the court and judgment entered against the insured dismissing his counter-claim, and thereupon the court gave judgment against the insured for the amount of the note and interest and cost of suit, and from this judgment he has taken error to this court.

There is no doubt of the right of an insured to have his policy canceled upon the terms provided by section 42, chapter 43, of the Compiled Statutes, which is as follows: "Any person, company, association or corporation transacting the business of fire, or fire, wind, storm, and tornado insurance, in this state, shall cancel any policy of insurance hereafter issued or renewed, at any time, by request of the party insured, or his legal representative, and shall return to the said party, or his representative, as aforesaid, the net amount of premium received by the company, after deducting the actual compensation of the

agent or solicitor for securing the issue of said policy, and also deducting the customary short-rate premium for the expired time of the full term for which said policy was issued or renewed, anything in the policy to the contrary notwithstanding."

The transcript from the county court recites the following in relation to the offer to confess judgment: "October 15, 1897, ten A. M., case called, plaintiff and defendant M. E. Houston present, and thereupon the defendant, M. E. Houston, filed her offer to permit judgment to be entered in favor of plaintiff for \$26 and costs to this date, and the plaintiff refusing to accept said offer, this cause came on for hearing on the pleadings and the evidence." There is nothing in this record from which we can determine whether the offer to confess judgment included, in addition to the customary short-rates, the actual compensation paid to the agent or solicitor for securing the issue of the policy, and, this being so, the presumption obtains that the offer was not sufficient. But, even if it did, we are entirely certain that an offer to confess judgment for the amount does not comply with the provisions of our statute in relation to the cancelation of policies. By the wording of the statute, the legislature seemed to have had in mind the cancelation of policies that had been paid for in cash only, but we are inclined to believe that a policy issued upon a credit where a note is taken for the premium is fairly within its meaning. In such cases, however, the insured can not claim a cancelation of his policy by confessing judgment for the amount of the premium computed at the customary short-rate, but he must actually pay or tender such sum to the company, when he will be entitled to a return of his note. No offer of payment being made in this case, the plaintiff in error was not entitled to have his policy canceled and note returned.

It is insisted in a very excellent brief filed by the plaintiff in error that the company, by refusing to accept judgment for what was earned upon the note, and by insisting upon payment of the full amount thereof, waived the suspension of the policy by reason of the default in payment

of the note and became liable for the loss which occurred during such default. There are many cases holding that, where the company insists upon the payment of the premium after loss has occurred, such collection is based upon an implied waiver of the forfeiture. These are cases, however, where the policy provides that it shall become void if the premium be not paid when due. In such cases, the non-payment of the premium at the stipulated time voids the policy at the option of the company, and it is the duty of the company to declare this option when the default occurs, and it waives the forfeiture in case it receives or enforces payment after the default. It can not occupy the attitude of demanding or receiving pay upon a contract, and at the same time insist that the contract is not in force and of no validity. The case under consideration is of a different character. It is nowhere stipulated that the policy shall become void on account of a failure to pay the premium note at maturity. The parties have contracted in this case that a failure to pay the premium note when due merely suspended the policy during such default, and that it may be reinstated at any time within the life of the policy by payment being made. In *Phenix Ins. Co. v. Bachelder*, 32 Nebr., 490, Judge NORVAL, in discussing a contract similar to the one now under consideration, remarked: "It is obvious that the failure to pay the premium note, at maturity, suspended the policy until payment was made. It could have been revived, for the balance of the term, by making full payment at any time before the loss. This, as we have seen, he failed to do. True, after maturity of the note, he paid \$15 thereon, but this did not give him the right to avail himself of the benefits of the contract of insurance. Nothing short of full payment, or a waiver of the stipulation in the policy, could have the effect to remove the suspension caused by the failure to pay the note. The clause referred to is not unreasonable. It is but fair and just that while the insured is in default of the payment of his note, the company should not be liable for loss, when the parties have so agreed. We have no right to make a new contract for them, or refuse to en-

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force the one they have made. To hold that the policy was in force, at the time of the fire, would be to set aside and disregard the plain stipulation of the parties." It is true that in that case no waiver on the part of the company was pleaded or shown, but the parties in this case have stipulated that: "In case of any loss of said property, either partial or total, while said note, or any part thereof, remains overdue and unpaid, this company shall not be liable for such loss, nor shall the payment of said note or the receiving or retention of the proceeds, or any part thereof, by this company, render it liable for any loss occurring while said note, or any part thereof, remained overdue and unpaid; nor shall such payment or retention be construed to be a waiver of any condition in this policy or application." The parties have made their own contract. The amount of the premium was undoubtedly based upon the terms and conditions contained in the policy. There is no complaint that it was not fully understood by the insured, and it contains nothing, so far as we are able to discover, that is contrary to the provisions of our statute, or that contravenes public policy. The plaintiff in error knew that a default in the payment of his premium note suspended the policy. He provided that it might again be reinstated when payment was made. Whether that payment be voluntary or enforced, the policy is revived from the date of payment. This is the contract of the parties, and we have neither the right nor the power to change it or amend it in any form. That notes made upon the conditions of the one in suit may be enforced is held in *Phenix Ins. Co. v. Rollins*, 44 Nebr., 745, and *McEvoy v. Nebraska & Iowa Ins. Co.*, 46 Nebr., 782.

We discover no error in the record, and recommend that the judgment be affirmed.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MARY C. KITCHEN ET AL. V. WILLIAM G. CHAPIN.

FILED MARCH 5, 1902. No. 11,316.

Commissioner's opinion, Department No. 3.

Married Woman: PROMISSORY NOTE: GUARANTY: LIABILITY. A married woman is liable on her guaranty of a promissory note owned by her and made payable to her order, and the purchaser of such a note is not driven to an inquiry of the purpose to which she intends to devote the proceeds of a sale thereof.

ERROR from the district court for Lancaster county. Tried below before FROST, J. *Affirmed.*

John P. Maule and Morning Bros., for plaintiffs in error.

John S. Kirkpatrick, contra.

DUFFIE, C.

William G. Chapin brought this action in the district court of Lancaster county against Mary C. Kitchen and A. D. Kitchen, alleging as his cause of action that he was the owner of a promissory note for \$500, made by James H. O'Neill and payable to the order of Mary C. Kitchen; that after the execution and delivery of said note, and before the maturity thereof, the said Mary C. Kitchen sold, assigned and delivered the note to him, and for that purpose the said Mary C. Kitchen and A. D. Kitchen indorsed on the back of said note the following:

"For value received, I hereby assign the within note unto William G. Chapin and hereby guarantee payment of the same and waive demand and notice of protest on same when due.

MARY C. KITCHEN,
"A. D. KITCHEN."

It is alleged that the note is due and unpaid, and judgment is asked against the defendants. Mary C. Kitchen filed the following answer: "Now comes Mary C. Kitchen and for her answer to the petition of the plaintiff says at

the time the note sued on was executed and the indorsements of assignment and guaranty made, she was a married woman, the wife of her codefendant, A. D. Kitchen, and living with him; that previous to this time she owned some city lots in Lincoln of uncertain value. Her said husband was engaged in the erection of some brick buildings in said city and was needing money. This defendant said to him if he could sell some of her lots she would make a deed to the purchaser and he, her said husband, could have the money realized from said sales to use in the erection of the said buildings he was erecting. Later he represented to her that he had negotiated a sale for certain lots, and asked her to execute a deed to the same to the defendants O'Neill, which she did. Later he brought to her the note and mortgage in suit and asked her to write her name on the back of it so he could use it in his business, which she did. The defendant alleges that she had no business dealings with the plaintiff whatever, that she has never been engaged in any trade or business and did not get or receive any benefit or consideration for the sale of said lots or for the execution of the deed she executed thereto or for the transfer of said note to the plaintiff or for said assignment and guaranty. She alleges that she did not enter into said contract of guaranty for the purpose of binding her separate estate or with reference thereto, but only for the purpose of passing the title of said note so her husband could get money to use in his own business and enterprises. Wherefore she prays that she may go hence without day and recover her costs." The reply is a practical admission of all the facts set out in the answer, except that she did not indorse the note for the purpose of binding her separate estate, or with reference thereto. The case was tried to the court without a jury, and judgment entered for the plaintiff below, and Mrs. Kitchen has taken error to this court.

The only question presented by the record is whether the plaintiff in error, a married woman, is liable upon her guaranty, under the admitted facts in this case. In order

to assist her husband in some building operation in which he was engaged, she sold certain lots which she owned in her own right, taking this note as a part of the purchase price. For the purpose of negotiating the note and obtaining money thereon for her husband's use, she guaranteed payment of the note, in the form above shown. Was this a contract relating to her separate estate, and did she intend thereby to bind her separate estate? In *Grand Island Banking Co. v. Wright*, 53 Nebr., 574, Judge NORVAL, in speaking of the liabilities of a married woman under our enabling act, remarks (page 578): "But this statute does not expressly, nor by implication, enlarge a wife's capacity to contract generally. She can buy and sell property in her own name and upon her own account, and enter into valid contracts with reference to her separate estate the same as if she were a *feme sole*, or as a married man may in relation to his property." It is undisputed that the note in suit was taken by Mrs. Kitchen on a sale of her separate property, and that the note itself was her separate property. She had the same right to hold and collect it or sell and negotiate it that a married man would have, and in the sale and transfer of the note she could undoubtedly bind herself by any contract of indorsement or guaranty that is usual or customary in the sale and transfer of such instruments. The contract was one relating wholly to her separate estate, in relation to which the statute empowers her to contract with the same freedom and to the same extent as though she were unmarried. The fact that the proceeds of the sale of the note were to go into her husband's business would not in the least affect her power to guarantee the payment of the note, and to bind herself by such guaranty. The third finding of the court is as follows: "That before the purchase of said note by the plaintiff, Mary C. Kitchen had given said note to the defendant A. D. Kitchen, to be used by him in his business, but that before said purchase said Mary C. Kitchen signed the guaranty hereinbefore found, and authorized her husband to put said note in circulation with

said guaranty thereon." It is insisted that this finding shows that Mrs. Kitchen had parted with all interest in the note, and had given the same to her husband prior to indorsing the same, and that she is therefore no more liable upon her indorsement than she would be by indorsing the note of her husband or of some third party. This third finding of the court is inconsistent with the admitted facts, and we think it is not to be considered. It is undoubtedly true that Mrs. Kitchen agreed with her husband, prior to a sale of this note to the defendant in error, that he might sell some of her lots and use the proceeds in his business. As before stated, the note in question was taken as part consideration on the sale of some of her lots; and, in the sense that she had agreed with her husband to give him the proceeds of these lots, she had given him this note. The record and her own answer make it plain, however, that she never transferred to her husband the legal title to the note by indorsing the same to him; and her answer admits that she indorsed the note at the request of her husband in order that it might be sold and the proceeds used in his business. We think that she is bound by the allegations of her answer, and that, fairly construed, admits that she indorsed the note in its present form for the sole purpose of negotiating the same and transferring the title.

Our attention has been called to some cases from other states, and particular attention directed to *Russel v. People's Savings Bank*, 39 Mich., 671. It appears from the statement of facts made by Judge Cooley in that case that Mrs. Russell, a married woman, was the owner of a note made to her by the Hamtramck Iron Works. She was also a stockholder in the Detroit Car Works. The latter company was indebted to the People's Savings Bank, which threatened suit for the collection of its claim. To prevent suit, Mrs. Russell indorsed the note given her by the Hamtramck Iron Works, and gave it to the bank as collateral security for the debt due it from the car company. The note not being paid at maturity, the bank brought suit

against Mrs. Russell upon her indorsement. Judgment went against her in the superior court, which was reversed in the supreme court upon the ground that her contract of indorsement was made for the benefit of the bank, and that she could not bind herself as surety for another. The statement of the case shows that she indorsed this note, not for any purpose of her own, but as security for the payment of a debt due the bank from the car company, and the fact that she was a stockholder in the company could not enlarge her liability on the contract. Judge Cooley disposes of such a claim in the following apt words: "But it is said that in this case the suretyship was for the benefit of a corporation in which Mrs. Russell was a stockholder, and therefore she must be supposed to have had in view in making it her own interest in the corporation. Mrs. Russell, however, was not identified with the corporation otherwise than as having an interest in it; the legal identity of each was distinct, and contracts for the benefit of the corporate estate were in no sense contracts for the benefit of the estate of one of its corporators. * * *

The test of competency to make the contract is to be found in this: that it does or does not deal with the woman's individual estate; possible incidental benefits can not support it. Tested by this criterion this contract of indorsement, so far as it involves a personal responsibility, must fail. Mrs. Russell has contracted for the advantage, not of her own estate, but of a corporation with which she is no more identified in law than she is with her husband or any third person. * * *

But there is no occasion to indulge in presumptions one way or the other; it is sufficient that the contract is one of suretyship merely, and as such is not one the statute empowers a married woman to make." In the case we are now considering, the note was made payable to Mrs. Kitchen. She offered it on the market with her indorsement in the form above set out; and, while the purchaser of negotiable paper takes it with constructive notice of the disability of the maker or the indorser, we do not think he is driven to the inquiry of the use to which

a married woman intends to devote the proceeds of a note payable to her order, and which she indorses to give it currency. Concededly, the law is that she would be liable on this contract of indorsement, had she invested the proceeds of the sale in the improvement of her separate estate or to her own personal use; and we can not bring ourselves to think that because she may invest it in presents made to her friends, or turns it over to her husband to be used by him in his business, that her liability is lessened in the slightest degree. A married woman in this state may engage in trade. Of necessity, she may take notes and bills in the conduct of her business, and having taken them, she may dispose of them like other traders. As a trader, she gives an implied warranty of her title to every article which she sells; and, in case the property is lost to the purchaser because she had no title when she sold to him, there can be no doubt of his right to maintain an action against her on her implied warranty of title. This being so, why can she not make an express warranty of the quality of the goods she offers for sale,—a warranty that is valid and may be enforced against her? If she has not that power, then the statute which gives her leave to engage in trade places her at a disadvantage with other traders, who can make a valid warranty upon which their customers may rely as affording them protection. So, too, in the disposal of the notes and bills taken in the conduct of her business, if she can not sell and dispose of them when the necessities of her business demand ready money, and make an indorsement upon which she may be held liable personally,—if she can indorse, so as to transfer the legal title only,—then she is again at a disadvantage, and may be compelled to dispose of the notes and bills taken in the course of her business at a large discount, to a purchaser who would be willing to pay their full face value, if he could rely upon her indorsement, rather than on the solvency of the maker, who is perhaps unknown to him. These considerations lead us to believe that it was the intent of the legislature to give to a married woman the same rights

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as a married man possesses, and to impose on her the same liabilities in all transactions connected with her separate estate or trade or business, and that a person dealing with her in relation to her separate property need make no inquiry as to her intention in the disposition of the proceeds realized by her from a sale made either of notes or bills or of other property held by her in her own right.

We recommend the affirmance of the judgment.

AMES and ALBERT, CC., concur.

By the court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

FRANK MCCOY, JR. V. MARY ANN CONRAD ET AL.

FILED MARCH 5, 1902. No. 10,608.

Commissioner's opinion, Department No. 3.

1. **Probate of Will: DISQUALIFICATION OF WITNESS: HEIRS AT LAW.**

In a contested proceeding for the probate of a will, the heirs at law of the alleged testator are not disqualified by the statute as witnesses to transactions and conversations with the deceased.

2. —: **TESTATOR'S SIGNATURE AFFIXED BY ANOTHER: BURDEN ON**

PROPONENT. When in a contested proceeding for the probate of a will, it is disclosed that the name of the alleged testator was affixed to the instrument in controversy by some person other than himself, it is incumbent upon the proponent to establish by unequivocal evidence that the deceased gave direction to such person for writing his name, consciously and explicitly, and in the free and voluntary exercise of his faculties.

ERROR from the district court for Saunders county.
Tried below before SEDGWICK, J. *Affirmed.*

Good & Good, Enos F. Gray and Charles H. Slama, for plaintiff in error.

G. W. Simpson, contra.

AMES, C.

This is a contest about the admission to probate of an alleged will, said to have been executed on the 9th day of September, 1896, in Saunders county in this state, where the purported testator resided then and at the time of his death. The grounds of contest are that the alleged testator was without testamentary capacity, and that the instrument in controversy was obtained from him through the exercise of undue influence, and without his conscious volition. At the time the document was made he was very old, and infirm in health, and at his death he left surviving him, as his sole heir at law, a married daughter, Mary Ann Conrad, who is the contestant in this proceeding. By the alleged will his estate is divided between this daughter and one Frank McCoy, his nephew, who is the proponent in the contest. The probate of the instrument was refused both by the county court and, upon appeal, by the district court, and the case is now brought here by the proponent by proceedings in error.

On the trial before Judge Sedgwick and a jury, the daughter was permitted, over the objection of the proponent, to testify concerning certain conduct and conversations of the deceased indicative of his mental condition at and about the time of the alleged execution of the proposed will. The first and one of the most important questions presented, is whether she was a competent witness for the purpose. The statute provides (Code, sec. 329) that "no person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless," etc. If the statute is to be so construed as to exclude heirs at law as witnesses in cases of contest about the probate of alleged wills of the deceased, it is manifest that such persons will be put at great disadvantage in litigations of that kind. The execution of the will might be extorted by threatened

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or actual physical violence in their very presence, and, their lips being sealed, they would be helpless to prevent, or even effectually to protest against, the consummation of the outrage. And so it would turn out that, to repeat an often quoted phrase, that which was evidently intended as a shield for the protection of the testator's estate would be converted into a sword for its destruction. We do not think that such an interpretation of the statute can be adopted, or, to continue the figure of speech, that the shield ought at any time or under any circumstances to be discarded or lowered. After the will of a decedent has been established, the devisees and legatees are properly regarded as within the protection of the statute, but, so long as they are merely the proponents of a contested alleged will of the deceased, their interests are as clearly adverse to those of the heirs at law or other acknowledged representatives of the decedent as are those of other litigants seeking to recover against his estate on account of any other transaction had with him in his lifetime. In such litigation the plaintiffs or proponents, being named as devisees or legatees, as the case may be, are assailing the estate with the view of the appropriation of it, or of a part of it, to their own uses. Any such assailants are, therefore, clearly excluded by the statute, and so, of course, is an executor in the proposed will. If, in a case like the one at bar, the heirs at law are also excluded, we reach the surprising conclusion that the interests of all the parties, being mutually adverse, the deceased has no representative not disqualified as a witness concerning any transaction or communication touching the matter in controversy. To so hold would, as it seems to us, be a trifle absurd. But the court is not driven to so impotent a conclusion. The case was tried below with great care and deliberation, and the district judge took the unusual pains of preparing and filing a written opinion in support of his order overruling a motion for a new trial. Inasmuch as that document meets with our full approval, and, as respects the point under discussion, we can add nothing to it by way either of argument or of illustration, we reproduce it, as follows:

"In this motion for a new trial it is urged, first, that it was error to allow Mrs. Conrad, the contestant, as against the proponent of the will, to testify in regard to transactions and conversations had between the testator and herself. In order to justify excluding this testimony three things must concur: First, the witness offered must have a direct, legal interest in the result of the litigation; second, the evidence offered must relate to transactions and conversations had between the witness and deceased; third, the evidence must be offered against one who is a representative of the deceased person. If these things concur, the evidence must be excluded, unless it comes within the exception named in the statute.

"On the hearing of this motion it was earnestly contended on the one side that the evidence offered related to transactions and conversations between the witness and the deceased, and as earnestly contested on the other side. At the trial the evidence was admitted on the ground that the proponent of the will was not the representative of the deceased, within the meaning of the statute, and the other ground of objection was not much discussed or considered. Of course, if the proponent of the will is not the representative of the deceased, within the meaning of our statute, then the ruling complained of is correct. The word 'representative,' as used in section 329 of the statute, includes any person or party who has succeeded to the rights of the decedent, whether by purchase, descent or by operation of law. *Kroh v. Heins*, 48 Nebr., 691. Of course the question is whether he represents the deceased in the litigation in which the evidence is offered. The fact that he may be the general representative of the deceased will make no difference, unless he represents him in the question which is in dispute in the litigation. If an executor or an administrator is engaged in litigating some matter which is entirely foreign to the interests of the estate which he represents, the statute, of course, has no application. The statutes of the different states are so varied, and the decisions under them so numerous, that we must 'solve the

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question presented without much reference to adjudications based on other statutes.' *Wylie v. Charlton*, 43 Nebr., 840, 850. The Michigan statute [Howell's Annotated Statutes, sec. 7545] provides that 'when a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness on his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person.' In construing this statute in an action contesting a will, the court says: 'The contest is not between the estate, or the representative of the estate, and the proponent. The statute applies only when the estate is in some way one of the parties, and the heirs, assigns, devisees, or legatees are the others. * * * The only questions involved in this application are: Did the deceased in his lifetime make this will, and was he of sound mind and memory at the time? * * * The will does not increase or decrease the estate. The object of this statute is to prevent fraud and false swearing whereby estates become unjustly depleted in cases where no person on the part of the estate, except the deceased, has any knowledge of the facts necessary to sustain the claim in favor of the estate, or to make good the defense of the estate, when unjust claims are attempted to be enforced against it, and we see no occasion for extending the scope of the statute by judicial construction. It is limited in its reason and spirit by fair construction to contests on litigation upon claims between other persons and the deceased, existing prior to his death; to such suits and proceedings as the deceased would have been, if living, a necessary party, and since which his heirs, devisees, and legatees, personal representatives or assigns, are compelled to prosecute or defend for him in his place.' *Brown v. Bell*, 24 N. W. Rep. [Mich.], 824.

"I think this reasoning applies to our statute. If a party is so placed in a litigation that he is called upon to defend that which he has obtained from a deceased person, and

make the defense which the deceased might have made if living, or to establish a claim which the deceased might have been interested to establish if living, then he may be said, in that litigation, to represent a deceased person; but where he is not standing in the place of the deceased person, and asserting a right of the deceased which has descended to him from the deceased (that is, where the right of the deceased himself, at the time of his death, is not in any way involved), and the question is, not what was the right of the deceased at the time of his death, but, merely to whom has that right descended, in such a contest neither party can be said to represent the deceased. Our statute differs from the statutes of other states, in that it uses the word 'representative' only, and I think its purpose is manifest. The intent is not to allow a party who is interested in litigation to testify to statements or actions of a deceased person in derogation of the right of the deceased person, and the reason is because the deceased person, who alone might contradict him, can not now be heard. That is, in the language of the Michigan court, the statute is 'limited in its reason and spirit by fair construction to contests on litigation upon claims between other persons and the deceased, existing prior to his death; to such suits and proceedings as the deceased would have been, if living, a necessary party, and since which his heirs, devisees, and legatees, personal representatives or assigns, are compelled to prosecute or defend for him in his place.'

"I think the cases cited by the proponent in his brief are not in point. In *Re Eysaman's Will*, 20 N. E. Rep., 613, the evidence of a legatee under the will was offered. The heirs and the next of kin were contesting. The statute did not allow one interested to testify in his own behalf, 'against one claiming under a person deceased at the time of the trial.' There can be no doubt that the legatee was interested, and was offering to testify in his own behalf, and that the heirs and next of kin were, at the time of the trial, claiming under a person deceased. The other

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New York case cited (*In re Dunham's Will*, 24 N. E. Rep., 932) is precisely similar and is decided upon the authority of the case *In re Eysaman's Will*. In *Re Goldthrop's Estate*, 62 N. W. Rep. [Ia.], 845, the court places its decision upon the words of the Iowa statute [Code, 1882, sec. 3639], which contains the words, 'against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee,' etc.; and the court says: 'The case of *Brown v. Bell* was decided under the statute of Michigan, which is materially different from our own.' This difference between the statutes is apparent, but not more so than the difference between our statute and that of Iowa, so I think the Iowa case is plainly distinguishable from the one at bar; and I can not refrain from saying that the reasoning in the Iowa case is not satisfactory to my mind, and that the thought is suggested that perhaps the court was influenced by the decisions in *Blake v. Rourke*, 38 N. W. Rep. [Ia.], 392 and *Smith v. James*, 34 N. W. Rep. [Ia.], 309, both of which cases seem to have been under a very different statute. In the Wisconsin case (*In re Goerke's Will*, 50 N. W. Rep., 345), it was held that proponent and beneficiary could not testify as to what took place between him and the testator at the time the will was executed, under a statute which provides that no person in interest shall be a witness respecting any transaction or communication by him with the decedent. The discussion in the opinion is as to whether the matters testified to related to transactions or communications, and the point involved in the case at bar is not discussed. Indeed, it would not seem that this point could arise under their statute. These observations will apply, also, in *Re Valentine's Will*, 67 N. W. Rep. [Wis.], 12. The Indiana statute is so radically different from ours that authorities construing that statute are of no assistance whatever in determining the point under consideration. I think that the decisions of our court are in harmony with the ruling complained of, as shown in the contestant's brief. In *Clark v. Turner*, 50 Nebr., 290, it is said that the proponent of a will which

has been denied probate is not a person charged with the duties or powers of a personal representative of the deceased. I think that the evidence complained of was properly admitted, without regard to the question of whether or not it involved any transaction or conversation, within the meaning of the provision of the statute."

There are a great number of errors assigned, both with respect to the giving and the refusal of instructions by the court, and with respect to the rulings of the court upon the admission and rejection of testimony, which we do not think it necessary to decide or discuss, because we think that the decisive point is raised by an exception to the eighth instruction given by the court of its own motion, which is as follows: "If, after the paper in question had been prepared, Frank McCoy, deceased, being then illiterate and unable to write his name, at the request of some other person, assented to the signing of his name to the paper by Mr. Frick, and, while Mr. Frick held the pen in his hand, the said Frank McCoy, deceased, put his hand also upon the penholder while Mr. Frick made a cross or mark, and said Frank McCoy, deceased, so acted and assented without understanding the nature of the transaction, and without intending thereby to sign and execute the will, this would not be a sufficient signing to comply with the law." The statute enacts (Compiled Statutes, 1901, ch. 23, sec. 127): "No will made within this state, except such nuncupative wills as are mentioned in the following section, shall be effective to pass any estate, whether real or personal, nor to charge or in any way affect the same, unless it be in writing, and signed by the testator or by some person in his presence and by his express direction," etc. Construing this statute in *Murry v. Hennessey*, 48 Nebr., 608, this court say: "Thus it will be observed that the legislature, in unequivocal language, has made it imperative that a will, other than a nuncupative, when not signed by the testator himself, must, in addition to other requirements, be signed by some person in his presence and by his express direction, or the instrument will be in-

valid. Mere knowledge of the testator that his name is being signed by another, or that the signing was acquiesced in, or assented to, by the testator will not be sufficient. The statute exacts more than this. It requires that the signing of a will by another must be done in pursuance of the previously expressed direction of the testator. The statute is meaningless if this is not its scope and purpose. The same construction has been placed upon similar statutes in other states. *Waite v. Frisbie*, 45 Minn., 361; *Greenough v. Greenough*, 11 Pa. St., 489; *Asay v. Hoover*, 45 Am. Dec. [Pa.], 714; *Grabill v. Barr*, 47 Am. Dec. [Pa.], 420; *Snyder v. Bull*, 17 Pa. St., 60. In the Minnesota case the testatrix's name was signed by another person without her express direction, and on being requested to make her mark, she placed her hand on that of the one who signed her name, and he made the mark. The court, in construing the statute of that state which declares that a will shall 'be signed at the end thereof by the testator, or by some person in his presence, and by his express direction,' held that the will was invalid for want of proper execution. The case at bar is quite analogous to that. The will was prepared by Mr. Hockenberger, at the request and suggestion of Mr. Murry, the beneficiary. The person who drew the will signed Bridget Murry's name thereto, without being directed by her to do so. It is true her mark was made, but the evidence shows that it was made by Mr. Hockenberger, and that Mrs. Murry merely, at his suggestion, touched the pen while the mark was being affixed to the instrument. The signing not being at her express direction, the will was not executed as the law requires, and it is for that reason alone invalid." Now, as has already been said, it is undisputed that the supposed testator in this case was, at the time of the alleged execution of the instrument in controversy, very old, and extremely infirm, both in body and mind. It will be observed that the putting of the hand upon the pen while a cross-mark is being made is of no importance. All that such an act would indicate would be an assent to or recognition of or, at most, a

ratification of, the signature after it had been written. But this would not satisfy the statute, which requires a previous express direction to write the name. There are three witnesses who testified as to what took place with respect to writing it. The first is Frick, the attorney who wrote the instrument and supervised its execution. His testimony is as follows:

"Int. 35. You may state how it was that you came to sign the will, and place thereon the words 'Testator's name written by J. E. Frick at request of testator.'"

"Ans. to Int. 35. It occurred in this way: When the will was ready to be signed, I spoke to Frank about signing, and Tom spoke up and said that, owing to Frank's paralyzed condition, he didn't think he could write his name. I said that any one could sign his name at his request, and then Tom asked Frank whether Frank wanted me to sign his name to the will; and, after repeating it to him several times, Frank nodded his head, and I wrote his name to the will, with the statement as it appears."

"Int. 37. I will ask you (state fully) whether or not Frank McCoy requested you to sign his name to the will; that is, you may state what he said regarding it."

"Ans. to Int. 37. The matter occurred as I have detailed in the last question. Frank made no request of me in words, and in no other way, except as explained in the previous question."

The only two other persons present were the witnesses to the will,—Thomas McCoy, the father of the proponent, and one Mercer. The examination of McCoy in reference to this matter is as follows:

A. He signed it or made his mark when the will was finished.

Q. Who made his mark?

A. Mr. Frick.

Q. How did he come to do that?

A. With my brother's permission.

Q. How did he come to do that?

A. Frick says, "Can you write?" and he says, "No." He

says, "With your permission," he says, "can I write your name?" and he says, "Yes; write it."

Q. Who said to write it?

A. My brother.

Q. Then what did Frick do?

A. He did write it.

The testimony of Mercer upon the point is as follows:

Q. Whose signature was first attached to the will?

A. Mr. McCoy's, deceased.

Q. Just explain to the jury how that was done.

A. Mr. McCoy could not write, if my memory is right, and he asked Frick to write for him; and he took the pen and made a cross, and Frick held his hand while he made the cross, like that (indicating).

This last witness attempted only to give his memory, which was evidently very vague, about a transaction in which he was not pecuniarily interested, and he is clearly mistaken. Neither Frick nor McCoy testified that the decedent made an express or formal request that the former should write his name, or, in the language of this witness, "asked Frick to write for him." The most that can be made out from the testimony of either or both is that McCoy solicited and obtained from the deceased passive permission for Frick to write it; and the testimony of the former, taken alone, is so far from establishing that such consent was intelligently or consciously given, that it very forcibly supports the contrary inference. At all events, if Frick is to be believed, the consent, if any, was hesitatingly and reluctantly given after repeated solicitation. That, in the then physical and mental condition of the decedent, such repeated solicitation by the brother, who, as the testimony shows, had practically dictated the contents of the instrument, and in the presence of the attorney who had drawn it, operated as a restraint upon will, is a reasonable presumption. This presumption, we think, is not overcome by the offhand and too little qualified testimony of the witness McCoy, who, however, does not deny the solicitation, but puts into the mouth of the deceased

words which Frick, whose business it was to attend to the matter, evidently did not hear. In other words, a verdict in favor of the proponent could, in our opinion, have been successfully assailed as not being supported by sufficient evidence. The burden was upon the proponent to show by a preponderance of evidence that the instrument in suit was the free and conscious will of the decedent. That the deceased was under the constant guidance of his brother during all the time that the preparation of the document was in progress is undisputed, and it was the brother who was prompt to suggest the inability of the deceased to sign his name, and to take the last detail of the business out of his hands by procuring his consent to the writing of his name by the attorney. According to his testimony, his own solicitations were supplemented by Frick, and between them the hesitation of the deceased was overcome so far as to permit the writing of his name, but Frick says that he made no request in words, and signified his assent, if at all, only by nodding his head,—an act which, done by a feeble and paralytic old man, is of little significance. We think there is a very wide difference between the “express direction” of the statute, and a reluctant, passive and hesitating consent, such as this evidence discloses. We are not unmindful of the rule that a conclusion of fact drawn by a jury from conflicting evidence will not be disturbed, although even this rule must have its limitations and qualifications, if not its exceptions. Neither do we wish to be understood as saying that a direction for writing his name, given by a testator to another, is necessarily invalidated by such direction having been suggested to, or even requested of, the decedent. But we are of the opinion that the word “express” is used in the statute, not only in contrast to the word “implied,” but, to some extent, by way of emphasis, and that, in a contest such as is now under consideration, it is incumbent upon the proponent to show by unequivocal evidence that the testator gave direction for writing his name consciously and explicitly, and in the free and voluntary exercise of his faculties; and

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we think that the above-quoted testimony, which is all the evidence upon the subject disclosed by the record, falls short of this measure. If this conclusion is correct, none of the matters assigned for error are material, because the verdict rendered is the only one that could have been upheld by the record.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MODERN WOODMEN OF AMERICA V. ASA COLMAN ET AL.*

FILED MARCH 5, 1902. No. 11,294.

Commissioner's opinion, Department No. 3.

Insurance: WAIVER. It is a settled law of this state that if a beneficiary insurance association, like the plaintiff in error in this action, continues to collect dues and mortuary assessments from a member who has forfeited his beneficiary certificate, after knowledge of such forfeiture by its officers or agents intrusted with the duty of making such assessments, it shall be held to have waived such forfeiture, without regard to any restrictions or limitations incorporated in its certificates of membership or by-laws with respect to the power or authority of such persons to make such waivers.

ERROR from the district court for Cass county. Tried below before RAMSEY, J. *Affirmed.*

J. W. White, C. A. Atkinson, Jesse L. Root and J. G. Johnson for plaintiff in error.

Samuel Chapman and Matthew Gering, contra.

AMES, C.

Early in May, 1898, Varro H. Colman, who was, and for some years had been, a member in good standing of the

*Rehearing allowed. Reaffirmed. Opinion filed denying second rehearing.

plaintiff in error association, whose general character is too well known to require particular description, accepted service as locomotive fireman for the Wheeling & Lake Erie Railway Company. His certificate of membership named as beneficiaries his father and mother, the defendants in error in this action. The certificate contains the following clauses:

"Subject to all the conditions of this certificate and fundamental laws of this order and liable to forfeiture if said member shall not comply with said conditions, laws and such by-laws and rules as are or may be adopted by the head camp of this order from time to time, or the local camp of which he is a member.

"If, after a person has become a member of this fraternity, he engages in any of the employments or occupations enumerated in section A, division I, of the fundamental laws, his certificate thereupon shall be forfeited by such act, and the same shall be null and void. *Provided, however,* that a neighbor may, after becoming such member, without invalidating his certificate, be employed as railway brakeman, engineer, fireman, switchman, miner, plow-grinder, or employed in a gunpowder factory, or on the lakes or seas, or as a soldier in the regular army while in active service, if he shall, before entering upon any of the above mentioned occupations, file with the head clerk a written waiver of any liability of this order under his certificate of membership, for loss by death as the direct result of his being engaged in such prohibited occupation."

By one of the laws of the association it was enacted that, if a member should engage in the employment of locomotive engineer, his rights under his certificate should be forfeited, unless he should file with the head clerk of the company "a written waiver of any liability of this order upon his benefit certificate founded upon the death of such neighbor either as result of accident occurring in, or disease directly traceable to, his employment in such prohibited occupation." It was further enacted that no officer of the order was authorized or permitted to waive the fore-

going provisions, and that the clerk of the local camp should be regarded as an agent of that camp only, and not of the head camp, and that no act or omission on his part should have the effect of creating a liability on the part of the society, or of waiving any right or immunity belonging to it. It is undisputed that at the time of entering upon the prohibited occupation, or afterwards, Colman did not file the written waiver called for by the above-mentioned by-law, although the requirement for his so doing was called to his attention by the clerk of the local camp. There is no question that the clerk and his subordinates knew of the fact that the insured had accepted of, and was engaged in, the employment aforesaid, or that with that knowledge they continued to collect his monthly assessments and remit them to the head clerk for a period of three months, and until he was run over and killed by the engine upon which he was in service. There are a large number of errors assigned in the motion for a new trial and in the petition in error, but the only real question of importance is whether, upon this state of facts, the defendants in error, the beneficiaries named in the decedent's indemnity certificate, are entitled to recover upon that instrument. We think that this court, in *Modern Woodmen of America v. Lane*, 62 Nebr., 89, and in the series of decisions therein cited and approved, have definitely and finally answered this question in the affirmative. It would serve no useful purpose to engage so soon in another review of the authorities and of the principles involved. Notwithstanding the cunningly devised by-laws and stipulations of beneficiary associations like the plaintiff in error, the clerks of local camps are, in the matters of collecting and remitting assessments and the waiver of forfeitures, the agents of the societies and not of the local camps or of their members. As is pointed out by Sanborn, J., speaking for the United States court of appeals for this circuit in *Modern Woodmen of America v. Tevis*, 111 Fed. Rep., 113 (quoting from the syllabus): "The actual legal relations of parties to each other, their acts and transac-

tions, prevail over previous written stipulations, which were subsequently disregarded, and condition their rights. Where a beneficiary association empowers the clerk of a local camp to collect, receipt for, remit and report upon its benefit assessments, and the clerk acts under this authority with the knowledge and consent of all parties, the relation of principal and agent for this purpose exists, and conditions the rights of the parties, notwithstanding the fact that the by-laws and certificates of membership contain a uniformly disregarded stipulation that the clerk of the local camp shall not be the agent of the association, but shall be the agent of the local camp, which has no interest in the benefit assessments, and that the acts or omissions of the clerk shall not affect the liability or waive any of the rights of the association." It ought now to be regarded as the settled law of this state that if a beneficiary insurance association, like the plaintiff in error, continues to collect dues or mortuary assessments from a member who has forfeited his beneficiary certificate, after knowledge of such forfeiture by its officers or agents intrusted with the duty of making such collections, it will be held to have waived such forfeiture, without regard to any restrictions or limitations incorporated in its certificates of membership or by-laws with respect to the power or authority of such persons to make such waivers. It can not be regarded as material upon what ground or for what reason such forfeiture was incurred. The underlying principle is in all cases the same, namely, that the association, with full notice or knowledge, through its accredited agents, of the facts by reason of which the contract of insurance might have been avoided, has chosen to treat it as valid and in force, and to receive a consideration for so doing. It is no answer to say that such a rule renders the business of the association extremely hazardous, on account of the character of the persons who are necessarily chosen to represent it as officers of the local camps, and of the local influences to which such persons may be subjected. This is one of the hazards voluntarily assumed by those who engage in a business

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from which they may retire at will, and it furnishes no reason for relieving them from such obligations to the holders of their beneficiary certificates as are imposed upon those in other like enterprises, and as considerations of honesty and fair dealing demand.

It is unnecessary to consider the other errors assigned because, upon the admitted facts, no other verdict than that returned could have been upheld.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

McCORMICK HARVESTING MACHINE COMPANY v. JOHN
MILLS.

FILED MARCH 5, 1902. No. 11,131.

Commissioner's opinion, Department No. 3.

1. **Penal Statute.** A penal statute should not be extended beyond the plain import of its terms.
2. ———. The penal provisions of section 15, chapter 32, Compiled Statutes, have no application to the instruments enumerated in section 26 of said chapter.

ERROR from the district court for Dawson county. Tried below before SULLIVAN, J. *Reversed.*

E. A. Cook and O'Neill & Gilbert, for plaintiff in error.

N. R. Greenfield, *contra.*

ALBERT, C.

This action was brought to recover the statutory penalty for failure to discharge a chattel mortgage of record, after

its conditions had been performed. The case was tried to the court without a jury. The court found for the plaintiff, and rendered judgment accordingly. The defendant brings the case here on error.

This action is based on section 15, chapter 32, Compiled Statutes, which, so far as is material at present, is as follows: "Such mortgage when satisfied shall be discharged by an entry by the mortgagee, his agent or assignee on the margin of such index, which shall be attested by the clerk without fee; *Provided, also*, That the county clerk may discharge a mortgage on the presentation or receipt of an order in writing, signed by the mortgagee thereof and attested by a justice of the peace or some officer with a seal. Any mortgagee, assignee, or their legal personal representatives, after full performance of the conditions of the mortgage, who for the space of ten (10) days after being requested shall refuse or neglect to discharge the same as provided in this section, shall be liable to the mortgagor, his heirs, or assigns in the sum of fifty (\$50) dollars damages; and also for all actual damages sustained by the mortgagor, occasioned by such neglect or refusal, said damages to be recovered in the proper action." It will be observed that the section just quoted applies exclusively to chattel mortgages. In view of the assignment that the finding of the trial court is not sustained by sufficient evidence, and the questions discussed by counsel, we can not ignore one question, which we regard as decisive of the case, although not directly argued; and that is whether the instrument which it is alleged defendant failed to discharge of record, is a chattel mortgage, within the meaning of section 15 of the recording act. The instrument referred to is as follows:

"\$35.00.

LEXINGTON, NEB., Aug. 8, 1896.

"On or before the 1st day of November, 1897, for value received, I promise to pay to the McCormick Harvesting Machine Company, (a corporation organized and existing under the laws of the state of Illinois, and having its chief office and place of business in the city of Chicago, county

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of Cook, state of Illinois,) or order, at 1st Nat. Bank, Lex., Nebraska, thirty-five dollars, with interest at seven per cent. per annum from date until due; ten per cent. per annum thereafter until paid. The express condition of the sale and purchase of the Big 4 mowing machine, for which this note is given is such that the title, ownership or possession does not pass from the McCormick Harvesting Machine Company until this note and interest is paid in full, and the said McCormick Harvesting Machine Company, have full power to declare this note due and take possession of the said machine, whenever they deem themselves insecure, even before the maturity of this note, and sell the same at public or private sale, without notice. The proceeds (after expenses and interest are paid), to be applied on the note, and any balance then unpaid shall, in consideration of the use and rent of said property, be a valid and subsisting claim against the vendee."

One characteristic of a chattel mortgage is that it is a transfer of personal property, or of some interest therein, by the mortgagor to the mortgagee as security. In *Bedford v. Van Cott*, 42 Nebr., 229, this court says: "The mortgagee under a chattel mortgage acquires not the legal title to the property, but merely a lien thereon, the legal title remaining in the mortgagor." The instrument under consideration is not a transfer of property, nor of any interest therein by the alleged mortgagor to the defendant; nor does it operate to create a mere lien in favor of the defendant, while the legal title remains in such mortgagor. When it was made, so far as the property therein described is concerned, the alleged mortgagor had no title or interest therein to transfer. It belonged to the defendant. It was transferred to the plaintiff, by the defendant conditionally. One of the conditions was that the title should remain in the vendor until the purchase price was fully paid. That being true, it would be absurd to say that, under the instrument in question, the defendant acquired a mere lien on the property, the legal title remaining in the alleged mort-

gagor, because, as the greater includes the less, the vendor, at the time having absolute title, acquired no title to the property by virtue of such instrument, and, as the vendee did not hold the legal title, which was expressly reserved by his vendor, the legal title could not remain in the alleged mortgagor. The recording act itself clearly distinguishes between chattel mortgages and instruments of this character. Section 14, chapter 32, Compiled Statutes, is as follows: "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditor of the mortgagor, and as against subsequent purchasers and mortgagees, in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the county clerk of the county where the mortgagor executing the same resides, or in case he is a non-resident of the state, then in the office of the clerk of the county where the property mortgaged may be at the time of executing such mortgage, and such clerk shall indorse on such instrument or copy the time of receiving the same, and shall keep the same in his office for the inspection of all persons; and such mortgage or instrument may be so filed, although not acknowledged, and shall be valid, as if the same were fully spread at large upon the records of the county," etc. Then follows the section providing a penalty hereinafter set out. Then comes section 26, which is as follows: "That no sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any purchaser or judgment creditor of the vendee or lessee in actual possession, obtained in pursuance of such sale, contract, or lease without notice, unless the same be in writing, signed by the vendee or lessee, and a copy thereof filed in the office of the clerk of the county, within which such vendee or lessee resides; said copy shall have attached thereto an affidavit of such vendor or lessor, or his agent or attorney,

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which shall set forth the names of the vendor and vendee or lessor and lessee, or description of the property transferred and the full and true interest of the vendor or lessor therein," etc. There is no question, we think, that, had a contest arisen between the defendant and a creditor or subsequent purchaser of the plaintiff in regard to the sufficiency of the notice imparted by the record of the instrument in question, their rights would have been measured, not by the provisions of section 14, but those of section 26 of the recording act. Section 15 is penal in character, and should not be extended beyond the plain import of its terms. In our opinion, it has no application to instruments which, like the one in question, are enumerated in section 26. As the instrument in question is not a chattel mortgage, this action is unfounded and must fail.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

EMANUEL HUBENKA V. JOHN VACH.

FILED MARCH 19, 1902. No. 11,330.

1. **Amendment of Pleading During Progress of Trial: ABUSE OF DISCRETION.** The denial of an application for leave to amend a pleading during the progress of the trial, is not reversible error, unless, under the circumstances disclosed, the action of the court amounted to an abuse of discretion.
2. **Farm Lease: CASH RENT: WHEN DUE.** A farm lease providing for the payment of cash rent, but not fixing in express terms the time when the rent should become due, contained a clause binding the landlord, in case of a crop failure, or a decline in

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the prices of farm products, "to settle the payments of said rent as it becomes due to the best advantage for both parties concerned." *Held*, That, in contemplation of the parties, the rent was not to be due or payable before the crops had matured and were ready for market.

3. Possession of Property: PRESENT RIGHT: GENERAL OR SPECIAL.

The plaintiff having failed to show a present right to the possession of the property in dispute, under either a general or special ownership, the court did not err in directing the jury to return a verdict in favor of the defendant.

ERROR from the district court for Cuming county. Tried below before EVANS, J. *Affirmed*.

Thomas M. Franse, for plaintiff in error.

Milton McLaughlin, *contra*.

SULLIVAN, C. J.

This action was brought to recover possession of certain crops raised by John Vach upon the farm of Emanuel Hubenka in Cuming county in the year 1898. The petition was in the usual form, alleging absolute ownership of the property in the plaintiff. The answer was a general denial. At the conclusion of the evidence the court was of opinion that the plaintiff had failed to make a case, and directed the jury to return a verdict against him.

Of the numerous errors assigned, only two have been thought worthy of discussion by counsel. The first contention is that the court erred in refusing to permit the plaintiff to amend his petition by alleging a special, instead of a general, ownership of the property; the second is that the court erred in directing the jury to return a verdict in favor of Vach. The material facts are not in controversy. Hubenka rented his farm to Vach for a period of three years from March 1, 1897. The lease gave the landlord a lien on the crops, with the right to enforce it in the manner provided for the foreclosure of chattel mortgages. The stipulation for the payment of rent was in these words: "The first year's rent will be \$300 cash. The

second year's rent will be \$350 cash. The third year's rent will be \$375 cash. Provided further that in case of a failure of the crops, or a decline in prices of the crops, the party of the first part agrees to settle the payments of said rent as it becomes due to the best advantage for both parties concerned." In the month of September, 1898, while the crops raised by the tenant were yet in the stack, the plaintiff attempted to foreclose his lien by advertising the property for sale and selling it to himself. Upon this sale and purchase is based his claim of general ownership. It developed at the trial that, owing to a hostile demonstration on the part of the tenant and his friends, the sale was not made where the property was situate, but at the apex of an adjacent hill, where the plaintiff and those assisting him paused for a moment in their precipitate flight from the farm. Whether the sale thus made vested in the purchaser an absolute title seems to have been questioned at the trial, and the plaintiff, at the conclusion of his evidence, determined to change front and rely upon his lien rather than upon his claim of general ownership. But the court denied his application for leave to amend the petition and this ruling is alleged as error. The application was addressed to the sound legal discretion of the court and was, under the circumstances, properly refused. All the facts of the case were well known to the plaintiff when the action was commenced, and if he had any just excuse for not alleging his special interest at the appropriate time he should have presented it to the court, by affidavit or otherwise. *Commercial Nat. Bank v. Gibson*, 37 Nebr., 750; *Western Assurance Co. v. Kilpatrick-Koch Dry Goods Co.*, 54 Nebr., 241; 1 Ency. Pl. & Pr., 637. But even if the petition had been amended the plaintiff could not have succeeded. In no view of the case was he entitled to a verdict. The rent was not due when the foreclosure proceeding was instituted nor when the action to recover possession was begun. It is clear from the provisions of the lease above quoted that the cash rent was not payable before the crops were ready for the market. The amount of the rent could not be

definitely fixed until the crops were assured and the prices known. The theory of the plaintiff was that the rent was to be paid in two instalments, and that the defendant should have given a note for the first instalment maturing January 1, 1899, and a note for the second instalment maturing March 1, 1899. But the lease did not require the defendant to give notes, and he did not violate any of its provisions in refusing to give them.

The plaintiff claims that the defendant voluntarily surrendered the property in payment of the rent, but we find no evidence in the record tending to sustain this claim.

The judgment is

AFFIRMED.

HENRY H. COLLINS, APPELLEE, V. WILLIAM J. BROWN ET AL.,
APPELLANTS.

FILED MARCH 19, 1902. No. 11,352.

Foreclosure: ERROR: SUPERSEDEAS: UNDERTAKING: USE AND OCCUPATION. In an error proceeding from a decree of the district court foreclosing a real estate mortgage, an undertaking which does not provide for the payment of "the value of the use and occupation of the property" is not effective as a supersedeas.

APPEAL from the district court for Lancaster county.
Heard below before FROST, J. *Affirmed.*

Burr & Burr, for appellants.

Stephen L. Geisthardt, contra.

SULLIVAN, C. J.

The district court of Lancaster county rendered a decree of foreclosure in an action brought by Henry H. Collins, the appellee herein, against William J. Brown and others. The defendants at once gave notice of their intention to appeal, and obtained an order fixing the amount of the supersedeas bond at \$500. In due time an undertaking conditioned as required by section 677 of the Code of Civil

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Procedure was given and approved. Afterwards a transcript of the proceedings in the district court, together with a petition in error, was filed in this court, and a summons in error was issued, served and returned. While the cause was pending in this court the decree of foreclosure was executed by a sale of the mortgaged property. When the motion for confirmation came on to be heard, it was resisted by defendants, on the ground that the decree had been superseded. The trial court, however, held that the sale was valid, and entered an order affirming it. This decision was, in our judgment, entirely right. Defendants sought to obtain a review of the proceedings of the district court by prosecuting error to this court. They might have brought the case here by appeal, but they did not do so; and they might have changed the character of the proceeding in this court by dismissing the petition in error, but this they did not do. The remedy first chosen was adhered to. This is the only inference warranted by the record. *Monroe v. Reid*, 46 Nebr., 316; *Chicago, B. & Q. R. Co. v. Cass County*, 51 Nebr., 369. The undertaking given by the defendants contained no provision binding them and their surety to pay "the value of the use and occupation of the property" affected by the decree. It failed therefore to comply with one of the substantial requirements of section 588 of the Code of Civil Procedure, and consequently did not operate as a supersedeas. *State v. Thiele*, 19 Nebr., 220.

The order of confirmation is

AFFIRMED.

NOTE.—The bond or undertaking is not a condition precedent to obtaining a review, but is essential to obtaining a supersedeas. *Creighton v. Keith*, 50 Nebr., 810; *State v. Ramsey*, 50 Nebr., 166. The bond or undertaking does not supersede unless conditioned according to law. *State v. Ramsey*, *supra*; *O'Chander v. State*, 46 Nebr., 10. To supersede a confirmation, on appeal, the bond need not be in double the amount of the deficiency judgment. A bond to cover waste is sufficient. *Kountze v. Erck*, 45 Nebr., 288, 293.—REPORTER.

WILLIAM H. BABBY V. JOHN B. MUSSER.

FILED MARCH 19, 1902. No. 11,387.

1. **Forcible Entry and Detention: APPEAL.** In 1899 there was no valid statute authorizing an appeal to the district court in actions of forcible entry and detention, or forcible detention only, of real property.
2. **Derivative Jurisdiction: CONSENT OF PARTIES.** The jurisdiction of the district court in such actions, being derivative only, is not aided by consent of parties.

ERROR from the district court for Sheridan county.
Tried below before KINKAID, J. *Reversed.*

Frank J. Kelley and J. H. Edmonds, for plaintiff in error.

C. Patterson, contra.

SULLIVAN, C. J.

This was an action of forcible detainer. It was commenced in the county court of Sheridan county, and was tried and decided on April 4, 1899. The judgment was in favor of the plaintiff, John B. Musser. The defendant, William H. Babby, attempted to remove the cause by appeal to the district court. Both parties assumed that the appeal was valid, and the defendant, without challenging the jurisdiction of the court, entered a voluntary appearance, and participated in a trial which resulted in the judgment of which he is now complaining. The decision of the district court can not be approved. At the time of the trial in the county court, there was no valid statute authorizing an appeal in this class of cases. The statute which professed to give that right was not adopted in accordance with constitutional procedure, and in *Armstrong v. Mayer*, 60 Nebr., 423, was held to be void. The appeal was therefore a nullity; it did not vacate the judgment of the county court, and that judgment has always been, and

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is now, in full force and effect. The case in the district court was, in substance, a new action. Jurisdiction of the parties was acquired by their voluntary appearance; but original jurisdiction of the subject-matter was not given by law, and hence the judgment rendered by the court and brought here for review was, and is, absolutely void.

The decision is reversed and the action dismissed.

REVERSED AND DISMISSED.

NOTE.—The principle underlying the question of jurisdiction by consent is, that one may waive a personal privilege in all cases where public policy is not contravened thereby. Wells, Jurisdiction of Courts, sec. 86. On an appeal from the judgment of a justice of the peace, the appellate court acquires no jurisdiction if the subject of the action was beyond the jurisdiction of the justice. *Cooban v. Bryant*, 36 Wis., 605, 612.—REPORTER.

CHICAGO LUMBER COMPANY, APPELLEE, v. FLORENCE M.
BANCROFT ET AL., APPELLEES, IMPEADED WITH LEX-
INGTON BANK, APPELLANT.

FILED MARCH 19, 1902. No. 10,928.

1. **Unchallenged Finding of Fact.** The unchallenged findings of fact by a referee, when confirmed by the court, are binding on the party against whom they operate, and from the legal consequences flowing therefrom he can not escape.
2. **Usury.** Where a debtor executes a note and mortgage for a loan of money at a lawful rate of interest, and, at its maturity, enters into a new contract with the lender for a further extension of the loan, which is tainted with the vice of usury, and the lender, by agreement, retains the note and mortgage as collateral security to the usurious contract, in a suit to enforce the mortgage security the lender is restricted in his recovery to the amount due on the indebtedness at the time of making the usurious contract, after which all interest is, by force of the statute, forfeited.

APPEAL from the district court for Dawson county.
Heard below before SULLIVAN, J. *Affirmed.*

Henry D. Rhea, for appellant.

E. A. Cook and Warrington & Stewart, contra.

HOLCOMB, J.

A plaintiff instituted a suit to foreclose a mechanic's lien on real estate, making the appellant, the Lexington Bank, and appellees Bancroft parties defendant in the action. Defendants Bancroft were the fee owners of the property involved in the suit, and defendant bank claimed a lien thereon by virtue of a mortgage in its favor executed by the Bancrofts. The bank appeared in the action, and, by way of cross-petition, pleaded that the Bancrofts were indebted to it on a promissory note for the sum of \$1,122, executed by them to the bank, and that said note was secured by a real estate mortgage on the premises described in the petition, and prayed a finding of the amount due on the note and mortgage, and that the same might be adjudged a valid lien on said premises, and that the real estate be sold in satisfaction of the amount due, if the same were not paid at a short date, to be fixed by the court. To this cross-petition of the bank the Bancrofts filed an answer, in which the giving of the note and mortgage was admitted, and, as a defense, it was pleaded that the contract evidenced thereby was usurious, in that by the agreement of the parties thereto a greater rate of interest was charged for the loan and forbearance of money than the rate of \$10 per annum on the hundred dollars, the answer setting forth in detail the particulars of the transaction and the different items entering into the consideration of the note, and the amount of unlawful interest included therein. It was also pleaded that, after the maturity of the note and mortgage mentioned in the cross-petition, a new contract was entered into between the parties for a further extension of the indebtedness, and that said contract was likewise usurious; the answer stating in detail the facts constituting the alleged usury. Further renewal contracts were also pleaded, each of which, it was al-

leged, was usurious, and that at the time of filing the cross-petition the defendant bank held two notes of defendants Bancroft, other than the one declared on, as evidencing the usurious contract so pleaded, one being for the sum of \$1,400 and the other for the sum of \$200, giving the dates and maturity thereof. The answer prayed for an accounting, and the ascertainment of the amount actually due the bank, after allowing credits and payments claimed to exist in favor of the mortgagors, and for general equitable relief. There were other issues tendered by the answer, as to certain collaterals alleged to have been given to secure the debt, for the proceeds and value of which the Bancrofts claimed they were entitled to credit; but, as all such matters are eliminated from the questions presented for our consideration by this appeal, we need not further notice them. A reply was filed, denying the usury alleged in each and all of the transactions mentioned in the answer; the reply stating in detail the items entering into each of the notes executed by the Bancrofts, and the amount of interest charged in each, which, it was alleged, did not exceed ten per cent. per annum, and on the issues thus framed the parties went to trial. A referee was appointed to take the testimony and report to the court the evidence, with its findings of fact, and conclusions of law. We will only notice such portion of the report of the referee and the action of the trial court thereon on exceptions by the defendants Bancroft as seems necessary to an intelligent understanding of the points involved in the consideration of the case on appeal. We are not favored with a brief on the part of the appellees Bancroft, and are compelled to decide the controversy upon the record and a brief by appellant's counsel, with such independent research as we have had time for at our command.

The referee made several findings of fact, those material to the question now under consideration being as follows:

"6. I find that neither upon the note for \$1,122 made by the defendants Bancroft, to the defendant, Lexington Bank, and by them delivered to it, which note is set forth

in the defendant Lexington Bank's cross-petition and answer, nor upon any of the notes of which it is a renewal nor upon any of the items which are included in said note of which it is a renewal was there contracted for, received or reserved a rate of interest exceeding ten per cent. per annum, said note being the one secured by the mortgage set out in said cross-petition.

"7. I find that no part of said \$1,122 note has been paid, and there is now due thereon the sum of \$1,865.88 according to the terms thereof.

"8. I find that on the 12th day of April, 1893, a new note for the sum of \$1,299 was made and delivered by the defendants Florence M. Bancroft and William M. Bancroft, to the defendant Lexington Bank, as a renewal of the said \$1,122 note, and for the purpose of keeping the obligation created by said \$1,122 note in bankable shape, the said \$1,122 note being retained by the defendant bank, and marked "collateral" as shown by indorsement thereon, and said mortgage was also retained by said bank; that from time to time after the making and delivery of said renewal other renewals were made and delivered by the defendants, Florence M. Bancroft and William M. Bancroft, to the defendant Lexington Bank, for the same purpose, said \$1,222 note and said mortgage still being retained by said bank.

"9. I find that in these renewals and on them a greater rate of interest than ten per cent. per annum was contracted for, by and between the parties and by the defendant bank, and by it charged and included in said notes.

"10. I find that all of these renewals have been canceled and surrendered by the defendant bank to the defendants Bancroft, excepting the last two given, one of which two is for the sum of \$1,400 dated January 14, 1895, and signed by Florence M. Bancroft, and William Bancroft, and the other is for the sum of \$200 dated January 9, 1897, and made by William M. Bancroft, into which two notes all of the other renewals were merged; and the said \$200 note is the one in these findings mentioned in which said taxes

and said interest found to have been paid by William M. Bancroft were included, together with other items of indebtedness of said William M. Bancroft to said bank."

As a conclusion of law the referee found that the bank had a valid lien on the premises mortgaged for the amount found due by the seventh finding of fact, and was entitled to a decree of foreclosure as prayed, and a sale of the premises in satisfaction of the amount found due. On objections and exceptions by the defendants Bancroft, the trial court set aside the seventh finding of fact, and approved and confirmed the remainder. The court construed the referee's ninth finding to be and mean that at the time the indebtedness was renewed, April 12, 1893, a new and original contract was entered into, and the note and mortgage sued on were, by agreement of the parties, retained as collateral security to the contract then entered into, and so found, in effect, that such contract was tainted with the vice of usury, as was found by the referee, and that the amount then due on the indebtedness was the sum of \$1,238.13, to which sum the cross-petitioner was limited in its recovery, by reason of the usurious character of the contract, less credits which should be applied thereon, and regarding which there is no controversy, and entered a decree of foreclosure accordingly. The bank appeals.

It is argued in substance that, the note sued on being free from the vice of usury, and retained by the payee, the renewal contract did not discharge the indebtedness evidenced thereby; and that the agreement to take usury, even though made, could not affect such note and mortgage, and that the bank was entitled to recover the full amount due thereon, including interest, according to its terms; that the contracts of renewal can only be regarded in their character as collateral to the principal indebtedness, which is unaffected by any subsequent usurious agreement. It is also contended that the evidence will not support the finding of the referee that usury was contracted for in all or either of the renewal notes given after the maturity of the note for \$1,122, which was made the

foundation of the bank's cause of action, as stated in its cross-petition. As the bank did not challenge the findings of the referee, which were, with the exception noted, confirmed by the court, we think it is now bound by such findings, and can not be heard to dispute their truthfulness, or escape the legal consequences flowing therefrom.

This, therefore, leaves but one question to be determined, and that is, what is the legal effect with respect to the rights of the contesting parties, because of the contract of renewal entered into between them, whereby it was agreed that usurious interest should be charged for the further loaning of the money for which the notes were given, which indebtedness prior to the time of the first renewal had been evidenced by the note and mortgage pleaded in the bank's cross-petition, and which was found to be free from the taint of usury? Was it an extension of the time of payment under the old contract, which was free from usury, or was the nature of the transaction such as to give it the character of a new contract affected with the vice of usury? The finding of the referee, though somewhat obscure, was, we think, as construed and found by the trial court, a finding that the original indebtedness was satisfied by the execution of the new note then given providing for the payment of the sum for which made payable, at a stated time in the future, and the retention of the note and mortgage originally given, as collateral security for the fulfillment of the contract last entered into. The evidence as to the course of dealings between the parties fully justifies this inference. It was as though the parties had canceled the evidence of the old indebtedness, and, as security to the new, executed a note and mortgage on the debtor's real estate and delivered the same as collateral to the unsecured notes, evidencing the usurious contract. This is, in effect, what was in fact done. The note and mortgage were satisfied for the purpose for which they were executed and retained by the creditor as further security to the notes evidencing the new contract. The transaction by which the first renewal was accomplished,

and which was tainted with usury, as well as all subsequent transactions relating to the extension of the time of the payment of the debt, falls, we think, within the principle of the rule stated in *McDonald v. Beer*, 42 Nebr., 437, in which it is held: "Where a loan is made at a legal rate of interest and a note executed as evidence of the indebtedness thereby created, and at the maturity of the note a contract is made by which the time of payment is extended and a new note is given in which is included interest on the amount of the loan at a usurious rate for the time of the extension, the renewal note is tainted with usury." In the opinion it is said: "The judge who tried the case in the district court evidently adopted the view that the transaction was an illegal one or tainted with usury from the date January 16, 1885, when the first renewal notes were given in part for the interest figured at a usurious rate, and rendered judgment for the amounts loaned with legal interest from the dates of inception to January 16, 1885, deducting therefrom the several sums paid, and this we think was right and according to the correct rule of law as applied to such transactions. Where a loan is made at a legal rate of interest and a note executed as evidence of the indebtedness thereby created, and at the maturity of the note a contract is made by which the time of payment is extended and a new note is given in which is included interest on the amount of the loan at a usurious rate for the time of the extension, the renewal note is tainted with usury. Tyler, Usury, 352; *Webb v. Bishop*, 7 S. E. Rep. [N. Car.], 698, and cases cited." Applying the rule above stated to the case at bar, the bank would be entitled to recover the amount of the original indebtedness evidenced by the \$1,122 note, with all lawful interest accrued thereon to the date of the renewal contract, when usury was charged and contracted for, after which, by reason of the force of the statute on usury, the creditor must lose all interest which would otherwise accrue; and all payments made, whether as interest or as a part of the principal, would apply in extinguishment of

the principal and lawful interest accrued to that time. The decree of the district court based on the findings of the referee conformed to the rule stated; and this, we think, adjusted the differences between the parties in harmony with the law. The note and mortgage sued on were held as a pledge to the payment of the valid demands owing by the makers to the payee, and nothing more. Whatever sum was justly due the bank on the principal indebtedness, to which the mortgage was held as collateral security, the bank had the right to subject the property mortgaged to its satisfaction; but it could not claim or recover a greater sum, or establish a lien for a greater amount, than was actually due on the principal indebtedness. To the extent that the principal notes evidencing the indebtedness existing between the parties fail, because of their usurious character, to the same extent would the collateral security fail. Webb, Usury, sec. 296; *Bell v. Lent*, 24 Wend. [N. Y.], 230; *Moncure v. Dermott*, 13 Pet. [U. S.], 345; *Kellogg v. Adams*, 39 N. Y., 28, and authorities therein cited.

The decree of the district court gave to each of the parties their lawful dues, and is accordingly

AFFIRMED.

SULLIVAN, C. J., concurring.

I agree fully with the views expressed in the foregoing opinion. It is the business of the courts to ascertain the agreements of parties, not to make agreements for them by presuming the existence of mutual intentions which in truth never existed. It is entirely clear from the indorsement on the original note that it was to be held by the bank as collateral security; in other words, it became, by the express contract of the parties, a mere incident or accessory of the renewal notes. This contract was supported by a valuable consideration, and I can conceive of no sound legal reason why it is not enforceable. The amount due upon the original note could not be made the measure of the bank's recovery without violating the agreement under which the renewal notes were given. The parties having,

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by a valid contract, made the original note collateral, it is collateral, and must be dealt with as such. If the renewal notes were wholly void, the case would be different, for then there would be no consideration for the agreement making the original note a mere adjunct of the renewals.

SEDGWICK, J., dissenting.

The proposition that the giving of the renewal note, by which it was agreed to pay an illegal rate of interest upon the loan, operated to make the original note and mortgage usurious, seems to me unsound. In *Burnhisel v. Firman*, 22 Wall. [U. S.], 170, 22 Law. Ed., 766, it is said: "If a security founded upon a prior one be fatally tainted with that vice [usury] and the prior one were free from it but given up and canceled, and the latter one thereafter be adjudged void, the prior one will be revived, and may be enforced as if the latter one had not been given." In *Rountree v. Brinson*, 3 S. E. Rep. [N. Car.], 747, it is held: "When a note or bond taken for a valid debt, or to renew a valid note, is void for usury, the creditor may, in an action thereon, recover judgment for the valid debt, when the complaint alleges the facts constituting that debt; and an assignee of the note or bond has the same rights as the original creditor." To the same effect are *Cook v. Barnes*, 36 N. Y., 520; *Farmers & Mechanics' Bank v. Joslyn*, 37 N. Y., 353; *Rice v. Welling*, 5 Wend. [N. Y.], 595; *Russell v. Nelson*, 99 N. Y., 119, 1 N. E. Rep., 314. In *Farmers & Mechanics' Bank v. Joslyn*, *supra*, it was said: "The infected contract did not absolve the mortgagor from his antecedent obligations, nor did it impair the rights of the plaintiff under a prior and valid agreement. It is true that the usurer is not permitted, at his own election, to allege his illegal act as a ground for reinstating an old security; but it is equally true that a party, who claims to be the victim of exaction, can not avail himself of the invalidity of a later contract, as a shield from liability on one of earlier date, which was honest and free from vice. (*Brown v. Dewey*, 1 Sandf. Ch. [N. Y.], 57; *Swartwout v.*

Payne, 19 Johns. [N. Y.], 294; *Billington v. Wagoner*, 33 N. Y., 31; *La Farge v. Herter*, 9 Seld. [N. Y.], 241; *Crane v. Hubbel*, 7 Pai. Ch. [N. Y.], 413.)" Some of the cases were decided under statutes providing that a usurious note is void, and the fact is mentioned that the giving of such a contract would furnish no consideration for the surrendering of the former valid one, but I do not see any reason for making a distinction in this case. The finding of the referee was that all of the renewals which were usurious had been canceled and surrendered by the bank to the defendants Bancroft, excepting the last two given, and that when the first usurious renewal was given the original note, which was not usurious, was marked "Collateral," and it, with the mortgage securing it, was retained by the bank. It was upon this note and mortgage that this action was brought. There was then no agreement on the part of the bank to surrender or cancel the note and mortgage in suit. On the other hand, it was expressly agreed that it should remain a valid obligation, and be held as collateral to the subsequently executed renewal notes. It may be admitted that these transactions amounted to new agreements to pay an illegal rate of interest on the original principal, but this would not affect the liability on the note and mortgage in suit. In *Richards v. Kountze*, 4 Nebr., 200, after the original notes, which were not tainted with usury, became due, a contract was indorsed thereon, by which it was agreed to extend the time of payment of the principal of the indebtedness, and to pay usurious interest for such extension. Justice GANTT, delivering the opinion of the court, said: "If the original contract is bona fide, and wholly free from the taint of usury, then no subsequent agreement to pay usury, or an usurious premium upon the debt, will invalidate the instrument given for the payment of the debt, or affect the original contract with the vice of usury, or prevent the collection of the debt with its legal interest. And this proposition, I think, is well founded in principle and just in equity, for, if there was once a valid subsisting debt,

bearing interest, the contract creating such debt can not be impaired or destroyed by a subsequent void agreement. Such agreement would be a mere nullity, and could not impair or destroy rights acquired under a valid subsisting contract. *Stewart v. Petree*, 55 N. Y., 623; *Rice v. Well-ing*, 5 Wend. [N. Y.], 597; *Rogers v. Rathbun*, 1 Johns. Ch. [N. Y.], 367; *Early v. Mahon*, 19 Johns. [N. Y.], 150." This case was approved and followed in *Dell v. Oppenheimer*, 9 Nebr., 454. If in giving the renewal notes it had been expressly agreed that they should take the place of the former note, and if the former note had thereupon been canceled and surrendered to the maker, and the mortgage released of record, it might be questioned whether, under our statute, the illegal renewals could be rejected, and an action maintained to reinstate the former securities which had been surrendered and canceled for the sole consideration of an illegal agreement; but the facts in this case, as found by the referee, do not present that question. Here it was agreed that the original valid note and mortgage should continue as a liability against the makers thereof, and it seems to me clear that the holder of the valid note and mortgage can maintain this action thereon, unaffected by the subsequent illegal agreement. *McDonald v. Beer*, 42 Nebr., 437, does not seem to be in point, because in that case the action was on the renewal note, which was affected with usury, and in this case the action is upon the original note and mortgage, in which there was no usury.

I think a decree should be entered for the amount of the note sued on and interest, as reported by the referee.

ALBERT E. HILL, APPELLEE, v. WILLIAM F. MCGINNIS ET
AL., APPELLANTS.

FILED MARCH 19, 1902. No. 11,414.

1. **Highway: PRESCRIPTION: PUBLIC USER: MANIFEST CLAIM OF RIGHT.** To establish a highway by prescription, there must be a continuous user by the public under a claim of right, distinctly manifested by some appropriate action on the part of the public authorities, for a period equal to that required to bar an action for the recovery of title to land. *Lewis v. City of Lincoln*, 55 Nebr., 1.
2. **Public Highway: PRESCRIPTIVE RIGHT.** A prescriptive right to a strip of land as a public highway can not be acquired by lapse of time where the roadway is through the inclosed premises of the owner, and the use thereof permissive only, and the roadway is changed from time to time to suit the convenience of the owner, and no act of control or dominion over it is exercised or asserted by the public authorities.

APPEAL from the district court for Lincoln county.
Heard below before GRIMES, J. *Affirmed.*

H. S. Ridgely, for appellants.

Beeler & Muldoon, *contra*.

HOLCOMB, J.

Plaintiff, appellee, began an action to restrain the defendants, as county commissioners and road supervisors, from opening and maintaining a public highway across his premises as described in his petition. Issues were joined, and a trial had, resulting in a judgment perpetually enjoining the defendants from in any way interfering with the plaintiff in the possession of the real estate over which it is sought to maintain such highway. Defendants appeal.

Plaintiff, it is conceded, resides on and is the owner of the real estate described in his petition, over which the roadway is claimed to exist, and has the same inclosed with a wire fence, and uses it for farming and pasturage purposes. The right to maintain a roadway across the

land is based on the following order, made by the county commissioners: "The petition of residents of Cotton Wood, Gaslin, Fox Creek, Deer Creek, and Walker precincts to declare a public highway open by user was taken up and granted and the said route is hereby a public highway and open as follows: the route traveled by the public from the station of Ingham on the B. & M. R. R. section 30 town 9 north range 26 W. northwesterly up Deer creek to the head of said canon over the divide into the east fork of Snell canon thence down the east fork of Snell to where it unites with the main canon connecting at this point with county road 240." The sole and only question presented for determination by the record is whether the public has acquired a prescriptive right to the use of the strip of land, along which is a traveled road, as a public highway by adverse user for a period beyond the statute of limitations concerning title to real property. It is contended by the defendants that by user for more than ten years the public has acquired an easement over the land for a public road, and therefore their right to maintain it as such, and destroy the plaintiff's gates and fencing inclosing the same with his other land; and *Graham v. Hartnett*, 10 Nebr., 517, *Shaffer v. Stull*, 32 Nebr., 94, and *Rube v. Sullivan*, 23 Nebr., 779, are cited in support of such contention. The undisputed facts show, we think, more or less travel by the public across the land, not at the same place, but varying from four to eight rods at different places, for more than ten years before the order quoted was made by the county commissioners. The evidence is also conclusive that at no time prior to the entry of the order have the authorities of the county or road district exercised or attempted to exercise any control or other acts of dominion over the strip in question used for travel by the public. It is shown that the plaintiff entered the land as a timber claim in 1889, that he has been in control and possession of it ever since, and for several years prior to the commencement of the action had maintained an inclosure around his land, the traveling public being permitted to gain ingress and

egress through the inclosure and along the traveled way by means of gates constructed for that purpose and for the owner's convenience. Some little work to make the road more passable had been done by individuals, but never by the public authorities. It also appears that some tiling belonging to the county was at one time used by the owner to construct a culvert across the road through which to drain surface water. The owner would make improvements on his land and change the traveled roadway at will, so as not to interfere with his use of the land for the purpose for which occupied. He did not acquire the legal title from the government until 1899, and could not have done so under the law under which he entered the same until 1897. Under such circumstances, we think it altogether free from doubt that the public acquired no right by adverse user for the time required for the running of the statute, and that the trial court correctly decided that the injunction should be made perpetual. In *Engle v. Hunt*, 50 Nebr., 358, it is held: "To establish a highway by prescription there must be a user by the general public under a claim of right, and which is adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of time necessary to bar an action to recover the land"; and in *Lewis v. City of Lincoln*, 55 Nebr., 1, on the same point, it is stated: "There must be a continuous user by the public under a claim of right, distinctly manifested by some appropriate action on the part of the public authorities, for a period equal to that required to bar an action for the recovery of title to land." Says the author of that opinion: "The principle to be deduced from the authorities seems to be that a highway may be established by continuous adverse user by the public for a period equal to that required to bar an action for the recovery of title to land; but the use by the public must be under a claim of right distinctly manifested by some appropriate action on the part of the public authorities. If the use was by the express or implied permission of the owner of the land,

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and the public authorities have not improved or repaired it as a highway or exercised any control or dominion over it, a road by prescription is not established,"—citing a number of authorities sustaining the principle thus stated. In *Ward v. Cochran*, 150 U. S., 597, it is said: "A possession not actual, but constructive; not exclusive, but in participation with the owner or others, falls very far short of that kind of adverse possession which deprives the true owner of his title." See, also, *Larwell v. Stevens*, 12 Fed. Rep., 559. *Huffman v. Hall*, 102 Cal., 26, a case in principle the same as the one at bar, holds that, when land has been inclosed by a fence, this would of itself show that the use of it by the public for a way was only permissive and could not be regarded as an adverse user which would set the statute of limitations running. In the case at bar, the user exercised by the public was not adverse to the plaintiff, but in conjunction with his use and possession of the land for farming and grazing purposes. It was not inconsistent, but consistent, with his ownership and control over it. The roadway was changed by him from time to time to suit his convenience, and at no time can it be said from the evidence that he abandoned or surrendered his possession and ownership to the use of the public.

The order appealed from should be, and accordingly is,

AFFIRMED.

ROBERT LUCAS, APPELLEE, v. FRIENDLY LUCAS, APPELLANT.

FILED MARCH 19, 1902. No. 11,451.

1. **Parol Contract: SPECIFIC PERFORMANCE: STATUTE OF FRAUDS.** Plaintiff brought an action for specific performance of a parol contract for the sale of real estate. The evidence disclosed full performance of its conditions by the vendee, and partial performance by the vendor, who had executed a conveyance of a part of the real estate included in the contract, but refused to convey the whole of it because of an alleged failure of a part of the consideration, to support which there was no evidence. *Held*, That the statute of frauds would not prevent a court of equity from decreeing specific performance.

2. — —: ———: COURT OF EQUITY. Specific performance of a parol contract will be enforced by a court of equity where one party has wholly and the other partly performed it, and its non-fulfillment on the one hand would amount to a fraud on the party who has fully performed it. *Kofka v. Rosicky*, 41 Nebr., 328.

APPEAL from the district court for Pierce county.
Tried below before ALLEN, J. *Affirmed.*

O. J. Frost, for appellant.

B. F. Barnhart, contra.

HOLCOMB, J.

The appellant, defendant below, was the owner in fee of three certain lots located in the town of Pierce, Pierce county, Nebraska. The plaintiff, appellee, brought an action in equity to compel specific performance of an alleged oral contract for the sale of said lots entered into between him and the defendant prior thereto in Council Bluffs, in the state of Iowa, where the defendant was then living. The lots appear to be of little value and unimproved. The petition alleged, in substance, the contract of sale, giving the terms thereof; that the plaintiff had fully complied with and performed all the conditions thereof to be by him performed, and had fully paid the purchase price, and that the defendant had conveyed by warranty deed two of said lots; and that, although demanded so to do, she had neglected, failed and refused to convey, as by said contract she agreed to do, the other of said three lots. The answer admitted the receipt of the amount as alleged in the petition as the purchase price, the conveyance of the two lots and the refusal to convey the third one, because, as alleged, an account against a third party, which was to be assigned to vendor as a part of the consideration, was for a less sum than represented by the plaintiff. The reply was a general denial. All the evidence introduced was in behalf of the plaintiff and in support of his cause of action; the defend-

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ant offering no evidence. The trial court decreed specific performance as prayed, and defendant appeals.

The only question presented is whether the pleadings and the evidence will support the decree rendered. This, we think, must be answered in the affirmative. The evidence shows conclusively that the full consideration agreed upon was paid by the vendee and received by the vendor, who was his sister. She conveyed two of the lots in pursuance of the agreement, and then arbitrarily refused to convey the third because, as alleged, but not proved, the account of the third party was for a less sum than represented. She has, under the evidence, received the full compensation agreed upon, and has undertaken on her part to execute the contract, to the extent of conveying two of the lots included in its terms, and, without lawful excuse, refusing to convey the other one because of the alleged misrepresentation. This she can not do. The contract is an entirety, and, having been performed to the extent stated, a court of equity would be warranted in compelling its complete execution, although it be not in writing. Not to do so would work a fraud on the vendee. He has in good faith executed the contract, and paid the full purchase price. The vendor has partially performed the agreement, and then undertakes to recoup herself for the alleged damage on account of misrepresentation by retaining title to a part of the property agreed to be conveyed, and interposes as a defense the statute of frauds to protect her in her claim, and avoid a complete execution according to the terms of the agreement. Equity and good conscience will not permit her to do this, and the trial court was justified, under the evidence, in directing specific performance of the oral contract as one partially performed, and to a degree which would except it from the operation of the statute of frauds. *Kofka v. Rosicky*, 41 Nebr., 328.

The decree of the district court is accordingly

AFFIRMED.

CHRISTOPHER FRERKING, REVIVED IN THE NAME OF FRANK
W. BARTOS, ADMINISTRATOR, APPELLANT, V. ALBERT
THOMAS ET AL., APPELLEES.

FILED MARCH 19, 1902. No. 11,453.

1. **Mortgage: LAND PRIMARY DEBTOR.** Where land is sold subject to a mortgage existing thereon, as between the parties to the transaction, the land is the primary debtor, and a sale thereof may be resorted to for the satisfaction of the incumbrance.
2. ———: **INCIDENT TO DEBT: PURCHASERS OF TITLE IN GOOD FAITH.** A mortgage on real estate is an incident to the debt evidenced by the notes it secures, and passes with an assignment of the debt, and an unauthorized release of the mortgage would not prevent the enforcement of the rights of the holder of the notes to a sale of the property in satisfaction of the debt as to any save those who in good faith and without notice have obtained title to such property, relying on the record which disclosed the apparent satisfaction of the incumbrance.
3. ———: **FRAUDULENT ASSIGNMENT: RELEASE.** A grantee of land subject to a mortgage thereon fraudulently obtained an assignment of the mortgage and released the same, the notes secured thereby being unsatisfied. *Held*, as against an indorser of the notes, who was compelled to take up the same because of his liability as such, that the release was unavailing to deprive him of his lien thereon, and a sale of the property could be had to satisfy the debt.
4. **Suit to Reinstate Mortgage: ALLEGATA.** In a suit to reinstate a mortgage on real estate fraudulently released and enforce the lien created thereby, it was alleged that after the fraudulent release of the mortgage the notes secured by the same were transferred to a third party, and suit caused to be instituted against the payee on his liability as indorser, and that he was compelled because of such liability to pay for and take up such notes, which he did, giving the amount thereof. The answer alleged that, if any money was paid thereon, it was paid to some other and different person, without the knowledge or procurement in any manner of the defendants. *Held*, in the face of such an allegation, the defendants could not be heard to say and prove that the payment so made was in compromise of the plaintiff's liability as indorser, and for their benefit, in that it was agreed that no action should thereafter be maintained against the maker of the notes, or to enforce the security pledged to the payment of the debt.
5. **Third Party: ACTION: DEFENSE: INTENT.** While a third party

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may maintain an action or a defense under an agreement between others made for his benefit, it must appear that there was an intent by the promisee or person with whom the agreement was made to secure some benefit to such third party, and also that there existed some privity between the promisee and the party to be benefited.

6. —: **PURCHASER: KNOWLEDGE: NOTICE.** Where a person purchases real estate with knowledge of a third party's equitable lien thereon, or with notice of such facts as would put an ordinarily prudent man on inquiry which, if pursued, would lead to such knowledge, such person can not be said to be a good-faith purchaser without notice and entitled to protection as such.
7. **Review: DECREE: CONSTRUCTION OF TESTIMONY.** In reviewing a cause on appeal, where the findings and decree of the trial court can not be reconciled with any reasonable construction of the testimony, the same will be set aside as unsupported by sufficient evidence.

APPEAL from the district court for Saline county.
Heard below before STUBBS, J. *Reversed.*

William G. Hastings, Neal & Quackenbush and J. A. Wild, for appellant.

A. S. Sands, contra.

HOLCOMB, J.

Appellant, plaintiff below, brings this case here by appeal from a finding and decree adverse to him in the trial court. The action is one in equity, brought to reinstate a real estate mortgage alleged to have been fraudulently released, and to enforce a lien on the property described therein in favor of the plaintiff. The petition is grounded on alleged fraudulent acts and practices of the defendants committed to defraud the plaintiff out of his lawful rights. In substance it alleges that in 1892 the plaintiff, being the owner of a certain town lot in DeWitt, Saline county, which is the real estate in controversy, conveyed the same by warranty deed to defendant, Carrie Chesney, now Carrie Crane, and that she, to secure the purchase consideration, executed back to the plaintiff a mortgage thereon, securing thirteen promissory notes, for the sum of \$40 each, the

first payable April 14, 1893, and one maturing every four months thereafter, and drawing interest at ten per cent. per annum from maturity; that thereafter, on September 27, 1894, plaintiff sold and assigned the said notes and mortgage securing the same to one Mary Cobel, the notes being indorsed in blank, and the assignment of the mortgage being duly recorded; that on April 23, 1894, Carrie Chesney, the mortgagor, conveyed the premises to Lelia Chesney, subject to the mortgage, and with the intent to defraud the plaintiff; that on June 26, 1895, Mary Cobel sold the notes and mortgage to defendant, James Chesney, said notes being delivered with a blank assignment of the mortgage, and that this transaction on the part of Chesney was had with the intent to defraud plaintiff; that on July 10, 1895, Lelia Chesney, in collusion with James Chesney and Carrie Chesney to defraud plaintiff, made a release of the mortgage, which release was withheld from the records until after the commission of the acts thereafter complained of; that plaintiff was seventy-eight years old, a German ignorant of English, and incapacitated on account of ill health to do business, and that the Chesneys, by falsely and fraudulently representing that his indorsement of the notes was in full force and effect, and the mortgage unreleased, induced him to pay their agents, attorneys or assigns \$396 on said notes, and that suit was caused to be instituted to accomplish such wrongful purpose. It is alleged that the notes have been destroyed; that defendant Thomas, conspiring with the other defendants, and with full knowledge of plaintiff's rights, took a warranty deed of said premises dated December 24, 1897; and that all of the defendants except Thomas are insolvent, and that plaintiff is without remedy except by the enforcement of his rights under said mortgage, and prays for the ascertainment of the amount due him on said notes, and a foreclosure of the mortgage lien, and general equitable relief. The defendants Chesney in their answer deny the fraud charged, or the receipt of any money paid by plaintiff on the notes, and allege that, if any money was paid

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thereon, it was paid to some other and different person, and without their knowledge or procurement in any manner. It is also alleged that if any money was paid to obtain his release as indorser it was long after the release of the mortgage, and with knowledge that it had been released, and for the purpose of releasing plaintiff as indorser on the notes, and not in payment of the notes or any part thereof. Defendant Thomas answered separately, denying the alleged fraud, and alleges that he received a warranty deed for the premises, paying \$360 therefor, and denies that he had any notice or knowledge of plaintiff's claim; says that he bought the premises in good faith, and without any intention to defraud the plaintiff, and asks to have the title to said premises quieted in him, free of any incumbrance in favor of the plaintiff. The reply denies the allegation of new matter contained in both answers.

The badges and ear-marks of fraud and overreaching are discernible throughout the entire records, so far as the defendants Chesney are concerned; not that any fraudulent act may be directly imputed to the two defendants Carrie and Lelia Chesney, sisters of the defendant James Chesney, for, by the transactions in which their names appear, they are seemingly nominal parties only, the moving spirit and actor in all instances being the brother, who, it appears, being insolvent, carried on and did his business in the name of one or the other of the two sisters made defendants in the action. Whether he was the principal in the several transactions complained of or acted as the agent of his sisters is for the purposes of this case immaterial. In either instance, the legal consequences would be the same, and the plaintiff's rights in nowise changed thereby. It was he that negotiated the purchase of the property, although the deed was taken in the name of his sister, who, in turn, executed the notes and mortgage mentioned in the pleadings to secure the purchase price thereof. He purchased the notes from the transferee, Cobel, and obtained an assignment of the mortgage in blank. He negotiated the sale of the premises to the defendant

Thomas, and we may assume, in the absence of any evidence to the contrary, that he was the principal in all the transactions had, his sisters being only the intermediary for the conveyance of the property, and nominally holding title thereto, while he was in fact the beneficial owner, although it is unnecessary to determine this question. It is disclosed by the evidence that after the procurement of the notes given for the purchase of the lot from the indorsee, Mrs. Cobel, an assignment of the mortgage was obtained, the name of the assignee being left blank and afterwards filled in by inserting the name of his sister, Lelia Chesney, who was then the holder of the legal title to said property. The deed from Carrie to Lelia Chesney bears date April 23, 1894, and was not recorded until February 19, 1897. The assignment of the mortgage in blank from Mrs. Cobel was obtained June 26, 1895. Lelia Chesney, it appears, as assignee of the mortgage, and whose name was afterwards inserted therein, executed a formal release thereof July 10, 1895, the consideration, as given, being the payment of the debt; the release, however, not being recorded until December 31, 1897. Soon after obtaining the notes and mortgage from Mrs. Cobel, June 26, 1895, several of the notes were transferred, evidently by defendant James Chesney, to one Chaloupka, who, it appears, was a creditor of his, although the amount of the indebtedness is uncertain. Chaloupka at once instituted suit on the matured notes against the plaintiff on his indorsement. The notes then past due and unpaid were dishonored, and no notice thereof had been given to plaintiff such as would bind him as an indorser. He was visited by Chaloupka's attorney, and told that he would have to pay the notes sued on, and was liable therefor. No effort appears to have been made to collect of the maker, and no summons was served on her. The plaintiff then procured the assistance of the cashier of a local bank, in which he had a deposit of something over \$2,000, to pay whatever was necessary to relieve him from the litigation. Plaintiff's agent visited the county-seat, where the suit was

pending, for that purpose, paid for the notes and they were turned over to him. After returning home, on his statement that they were of no further use, the notes were destroyed. It is altogether clear that the plaintiff did not intend to release any of his rights as the owner of the notes by his purchase of them from Chaloupka, because of his liability as indorser, nor release the property given to secure the debt. The amount paid Chaloupka is uncertain. It is, however, clear that the indorser was not liable for the past-due notes, because no notice of their dishonor had been given him and in the settlement this seems to have been conceded. He was, however, liable for the unmatured paper, of which there were six notes, aggregating \$240, and this sum, at least, was no doubt paid in the settlement of the litigation, and to get the notes on which he was liable back into the hands of the plaintiff. It is quite obvious that the attempt under the manipulations of defendant James Chesney to secure the release of the property from the lien created by the mortgage, and at the same time put the notes again in circulation, was for the sole purpose of enforcing payment against the plaintiff as indorser, and thereby deprive him of such security, he being the only responsible party against whom an action would lie for a personal judgment. Whether Chaloupka was a participant in this transaction, having knowledge of the object sought to be accomplished by the person from whom he received the paper, is not altogether clear; nor is it essential to plaintiff's right to relief that such should be the case. His action in immediately undertaking enforcement of payment against plaintiff as indorser, and the after transaction culminating in plaintiff's paying him the amount agreed upon, would indicate that he allowed himself to become a party to the questionable transaction. The property had been transferred by the mortgagor, Carrie Chesney, to Lelia Chesney, subject to the mortgage, and the latter, when she obtained the assignment of the mortgage in the manner she did, could no more deprive the plaintiff of the security pledged to pay the debt than

she could her sister, as maker of the notes, had she been compelled to pay them. As between the parties the land was the primary debtor, and its sale could be required in satisfaction of the incumbrance thereon, and subject to which the grantee, Lelia Chesney, obtained title thereto. *McNaughton v. Burke*, 63 Nebr., 704. The mortgage itself had no independent existence. It was an incident to the debt evidenced by the notes, and passed with their assignment to whomsoever might obtain them with the right to enforce their collection, notwithstanding the attempted release of the mortgage lien; and this right would exist in favor of the holder of the notes, and against every one holding title to the property, save those who in good faith and without notice had obtained title relying on the record disclosing the apparent satisfaction of the incumbrance existing thereon. *Webb v. Hoselton*, 4 Nebr., 308; *Daniels v. Densmore*, 32 Nebr., 40; *Todd v. Cremer*, 36 Nebr., 430; *Whipple v. Fowler*, 41 Nebr., 675; *Mathews v. Jones*, 47 Nebr., 616.

It is, as has been noted, alleged that this settlement was had as a compromise, and for the purpose of releasing the plaintiff as an indorser, and that he did not thereby become the purchaser and owner of the notes with a right to enforce payment by a resort to the mortgage security. It is drawn out on cross-examination of the cashier of the bank that at the time the notes were given up he agreed that it was not "for the purpose of enforcement or of holding against the maker." If, as alleged, this transaction between the agent of plaintiff and the holder of the notes was with third parties, whom the defendants had no relation to, nor connection with, we can not understand why the attempt is made to show that the contract of settlement was made in their interest and for their benefit. If they had nothing to do with the transaction, and were in no way related to it, nor in privity with Chaloupka, it would seem to be an immaterial matter as to them whether in fact, as alleged, the payment was made "for the release of said plaintiff as indorser upon said notes and not in

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payment thereof, or any part thereof." Why should Chaloupka be so greatly concerned about releasing the maker of the notes or the security given therefor if the transaction was "entirely without said defendant's knowledge or procurement in any manner"? They no doubt were aware that if the action thus taken, and the payment of the defendant's obligation thus obtained, was with their procurement, knowledge or consent, then it is apparent that the fraud practiced on the plaintiff would vitiate the agreement relied on to release them and the property from further liability; but if, as is alleged, they had no part in the transaction, nor procured it to be done, then we are unable to appreciate how the defendants may invoke the agreement claimed to have been made for the purpose of relieving the property of the incumbrance which was specially pledged as a guaranty of the ultimate payment of the debt. Surely Chaloupka could have enforced the mortgage lien had he so desired; and, if so, it is difficult to understand what tenable objection there is to the plaintiff, who has succeeded to his rights, from likewise enforcing the lien. While it is true that an agreement may be made for the benefit of a third person and enforced by the latter, though not a party to the consideration (*Morrill v. Skinner*, 57 Nebr., 164, and authorities there cited), the rule does not, however, extend to entire strangers, who are not in privity with, nor in anywise related to, the parties to the transaction so had. Says the supreme court of New York in *Vrooman v. Turner*, 69 N. Y., 280, 283: "To give a third party who may derive a benefit from the performance of the promise, an action, there must be, first, an intent by the promisee to secure some benefit to the third party, and second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally." See, also, *Embler v. Hartford Steam Boiler Ins. Co.*, 158 N. Y., 431, 44 L. R. A., 512; *Klemer v. Sheffield*, 80 N. W.

Rep. [Minn.], 1055. As to the defendants Chesney, it is difficult to conceive of any theory of the case as presented by the record which would deny to the plaintiff the right to enforce the lien upon the property created expressly for the purpose of securing the payment of the debt.

We assume that the finding of the trial court, and the decree resulting therefrom, arose from conclusions arrived at with respect to the rights of the defendant Thomas, who claims the property free from any lien by virtue of the mortgage, as an innocent purchaser in good faith, and without notice of the equities of the plaintiff therein. This is practically conceded to be the situation by the appellees, whose counsel say in their brief: "The plaintiffs, in addition to other things which they have failed to prove, have failed to show that the assignment of the property was kept off the records by Thomas, or by any one else at the request or desire of Thomas for the purpose of defrauding the plaintiff in this action. They have also failed to show that he had any notice whatever of any fraudulent intent on the part of any one or that he in any way participated in any fraud." It is then argued that the finding of the trial court generally for the defendants is supported by sufficient evidence, and should not, under the rules respecting findings of fact by a trial court, be disturbed on appeal. We are disposed to think likewise that this question is the only one of a substantial character regarding which there can be any doubt, or cause for hesitancy and investigation in arriving at a correct determination. If Thomas, as is claimed, is a bona-fide purchaser of the property without notice, whatever may have been the fraud practiced by the other defendants, he would escape its consequences, and hold the property purchased free from the lien sought to be enforced thereon. Thomas lived in the same town where all the parties resided, which is a small village in Saline county. He, it is clear, was intimately acquainted with the plaintiff and the other defendants. The transaction by which the plaintiff paid for and obtained the unmatured notes and settled the litigation

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began against him occurred in July, 1895. He admits the transaction had created a great deal of talk, and, as he expressed it, was the talk of the town for more than a year before he bought the property. It is also entirely clear that because thereof he was in doubt as to the title he would secure were he to purchase the property. He consulted a lawyer and an abstractor as to the title he was securing, and it is evident that this was not merely a precautionary measure, which is commendable in any intended purchaser, and as a prudent person would ordinarily do, but, rather, in view of the current talk as to the plaintiff having been defrauded out of his property and the security given for its purchase price, would he be safe in purchasing the property because the record title appeared clear, notwithstanding the acts which had transpired and of which he had general knowledge, and as a result of which the plaintiff had apparently lost his security.

Throughout the entire testimony it is disclosed that he relied exclusively on the fact that the records exhibited a clear title, and that he closed his eyes and ears to the many statements brought directly home to him impeaching the title of his grantor because of the fraudulent acts of the defendant James Chesney. Several witnesses testify to statements made to, by, and in the presence of Thomas regarding the state of title to the property before he had purchased, and that he had ample notice so that he might have learned to the minutest detail all the facts surrounding the transactions heretofore spoken of. He does not, only in an indirect way, deny having such notice. He testifies in general terms that he had no knowledge of any fraudulent acts of his grantor or the other defendants. In giving his testimony, after speaking of some inquiries he had made after he had purchased the property, he was asked:

Q. That was the first you knew of anything concerning a claim or interest on the part of Mr. Frerking, was it?

A. Oh, I don't know as I could say that, because that had been a matter of talk for years, I should say; I don't know when it was.

Q. What had been a matter of talk for years?

A. This matter of swindling Frerking out of the property.

Q. Have you in any way aided or assisted in a conspiracy in this matter?

A. No, sir; I will say that I had rented the place before, and Mr. Chesney did not feel like fixing it up for me; the location suited me for my business. The location of the lot was all right, and he told me I had better buy it, and I knew nothing, personally, about the other deals that had been made. I suppose I had heard of them, like any man who has been in DeWitt,—everybody had heard about it.

The abstractor, who was called as a witness for defendant, testified: "I told Mr. Thomas that the deed made by Carrie S. Chesney to Lelia Chesney was made subject to a mortgage of \$380, and that there was no such mortgage shown of record; that he had better get a statement from Miss Chesney showing that there was no mortgage of record, or no mortgage recorded; that it might possibly be that the mortgage referred to in that deed was the Frerking mortgage, and with a part unpaid."

Different witnesses for plaintiff testified to conversations with and in the presence of defendant Thomas before he purchased the property, pointing unmistakably to the fact that he was forewarned of the plaintiff's equities in the property. We can not, nor would it serve any useful purpose to set forth *in extenso* the testimony bearing on this point, and must content ourselves with conclusions proper to be drawn therefrom. That the defendant Thomas, at the time of purchasing the property, had direct knowledge of the plaintiff's claim, can hardly be doubted by one reading the record; that he had such notice of the plaintiff's claim as would put an ordinarily prudent man on inquiry, which, if followed up, would lead to actual knowledge of his rights in the premises, is beyond all reasonable doubt; and this is all that is required in order to charge him with such notice as would preclude him from claiming the protection and rights of a good-faith purchaser, who takes the prop-

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erty freed from any equities existing against the same, and in reliance on the public records showing a perfect chain of title. *Veeder v. McKinley-Lanning Loan & Trust Co.*, 61 Nebr., 892.

While it is the well-established rule of this court that a finding of fact based on the evidence will not be disturbed unless clearly wrong, the present case, we think, is an exception to the general rule, and in no rational view of the record, construing the testimony as favorably to the defendant as it is fairly susceptible of, can it be said that the evidence will support a finding that the defendant Thomas was a good-faith purchaser of the property without knowledge of plaintiff's rights or notice of facts which would put an ordinarily prudent person on inquiry, which, if followed up, would lead to such knowledge. As between him and the plaintiff, the equities are all in favor of the latter; and Thomas, rather than the plaintiff, should suffer the loss.

From the evidence we are unable to say that plaintiff, in the transaction by which he took up the notes he had formerly indorsed, acquired title to only those which at the time were unmatured, and on which he was liable as indorser, which aggregated \$240, and interest from the maturity of each, respectively, and therefore conclude the amount to which he is entitled to a lien, is limited to that sum. The decree of the district court is reversed and the cause is remanded, with directions to the district court to award plaintiff a lien on the mortgaged premises for the principal sum stated, with accruing interest thereon, and directing a sale of the property in satisfaction thereof.

JUDGMENT ACCORDINGLY.

CODDINGTON SAVINGS BANK, APPELLANT, v. JOHN G. ANDERSON, APPELLEE.

FILED MARCH 19, 1902. No. 10,280.

1. **Promissory Note: INDORSEMENT: NEGOTIABILITY.** An indorsement upon a promissory note as follows: "For value received I hereby assign and transfer the within bond and coupons thereto annexed, together with all my interest in and rights under the mortgage securing the same, to Coddington Savings Bank, without recourse," signed by the payee in the note, does not destroy the negotiability of the note.
2. ———: **PAYMENT: ELECTION: BURDEN OF PROOF.** If the maker elects to pay a negotiable promissory note to one who can not and does not produce the note, by so doing he assumes the burden of showing that the party to whom he paid it was the owner of the note, or was authorized by the owner to receive the money for him.

APPEAL from the district court for Harlan county.
Heard below before BEALL, J. *Reversed.*

James McNeny, for appellant.

Riley L. Keester, *contra.*

SEDGWICK, J.

In December, 1885, the defendant, John G. Anderson, executed a note for \$500, with ten interest coupons of \$20 each, and a mortgage securing the same, to one James H. Tallman. Mr. Anderson transacted this business with the Nebraska & Kansas Farm Loan Company, of Harlan county, Nebraska, and the securities were upon land in that county. Mr. Tallman was a member of the firm of Moore & Co., of Hartford, Connecticut, and it appears from the evidence that the note and mortgage were taken in his name at the request of Moore & Co. Immediately after the papers were taken they were forwarded by the Nebraska & Kansas Farm Loan Company to Moore & Co. at Hartford, Connecticut, and were thereupon sold by Moore & Co. to this plaintiff. Afterwards the amount of

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the interest coupons, as they became due, was paid by Anderson to the Nebraska & Kansas Farm Loan Company, and the money forwarded to Moore & Co., and by them paid to the plaintiff bank. A few days before the principal became due, Anderson sent the amount of the principal and the last interest payment, \$520, to the Nebraska & Kansas Farm Loan Company, which company acknowledged receipt of the money, and promised to forward Mr. Anderson the papers as soon as they could be obtained from the east.

1. The first question presented is as to the negotiability of the note. The indorsement thereon is as follows: "For value received I hereby assign and transfer the within bond and coupons thereto annexed, together with all my interest in and rights under the mortgage securing the same, to Coddington Savings Bank, without recourse. James H. Tallman." And it is insisted, under the authority of *Aniba v. Yeomans*, 39 Mich., 171, that by such indorsement the negotiable character of a promissory note is destroyed. In that case the indorsement was: "I hereby transfer my right, title and interest of the within note to S. A. Yeomans." It did not purport to transfer the entire note, as does the indorsement in this case. We think that the indorsement in this case does not destroy the negotiability of the note, and this objection is not well taken.

2. If it is admitted, as claimed by the defendant, that the evidence in the case is sufficient to establish the fact that the money loaned to the defendant was the money of George W. Moore & Co., and that the Nebraska & Kansas Farm Loan Company was the agent of Moore & Co. in negotiating the loan, the next question then is as to the authority of the Nebraska & Kansas Farm Loan Company or Moore & Co. to receive the money from the defendant on behalf of the plaintiff, the Coddington Savings Bank. There is no doubt, under this evidence, that the Coddington Savings Bank bought this note in good faith in the regular course of business, and was entitled to receive the proceeds thereof. It is also made clear that the Nebraska

& Kansas Farm Loan Company, having failed in business soon after the receipt of the money from the defendant, never paid the same to the plaintiff, nor to Moore & Co. The evidence in regard to the authority of the Nebraska & Kansas Farm Loan Company to receive this money on behalf of the plaintiff is very similar to, in fact almost identical with, the evidence in the case of *Richards v. Waller*, 49 Nebr., 639, and it was there held, quoting from *Bull v. Mitchell*, 47 Nebr., 647: "Where payment of a negotiable note secured by mortgage was made to an investment company of which the mortgagee was manager, and such payment was never forwarded to the party to whom such note had been transferred, held, that the mere fact that antecedent payments made in like manner had been made to be forwarded to the transferee of such note, and had been so forwarded, did not bind the holder of the note as to the final payment not forwarded, it being shown by the evidence that such holder had never in any way held out or recognized the mortgagee as his agent." This was also approved, upon a similar state of facts, in *City Missionary Society v. Reams*, 51 Nebr., 225. We are satisfied with these decisions, and no good purpose could be served by reviewing the evidence further in this case.

There is no reason for holding the plaintiff to have ratified the action of the Nebraska & Kansas Farm Loan Company, since there is no evidence that the plaintiff ever knew of that action, and, although the plaintiff delayed something over three years after the maturity of the paper before beginning this suit, and did not in the meantime notify Mr. Anderson that it had not received the money, still this is no ground of estoppel against the plaintiff, since it is not shown that Mr. Anderson ever transacted any business directly with the plaintiff, but always paid his money to some other parties, who forwarded it to the plaintiff; and these parties to whom Mr. Anderson paid his money, and who paid it for him to plaintiff, had full knowledge of all the facts. The plaintiff had no notice of this payment by Mr. Anderson until shortly before the

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action was begun, when it was notified by Moore & Co. that Mr. Anderson claimed that he had paid the mortgage. Plaintiff immediately forwarded the mortgage for foreclosure. The rule of law by which to determine which of these innocent parties must suffer this loss is well settled. The note being negotiable in form, if the maker elects to pay it to some one who can not and does not produce the note, by so doing he assumes the burden of showing that the party to whom he paid it was the owner of the note, or was authorized to receive the money. This he failed to prove, and the decree of the district court is therefore reversed, and the cause remanded, with instructions to enter decree in favor of the plaintiff for the amount due upon the note and mortgage.

REVERSED AND REMANDED.

JAMES MORTENSON ET AL., REVIVED IN THE NAME OF JOHN
MEISTER, ADMINISTRATOR, v. MARTHA BERGTHOLD.

FILED MARCH 19, 1902. No. 11,331.

Commissioner's opinion, Department No. 1.

1. Administrator: FINAL SETTLEMENT: ORDER OF COURT: FAILURE TO COMPLY: CONDITION OF BOND: BREACH. Failure to comply with a decree of the county court requiring an administrator to pay in money found on his final settlement to be due the estate, is a breach of the conditions of his bond under the statute.
2. —: —: —: —: —: —: STATUTE OF LIMITATIONS. The statute of limitations does not begin to run against an action for such breach of the conditions of the bond till the final decree directing payment is entered.
3. —: —: —: —: —: —: —: IMMATERIAL EVIDENCE: RES ADJUDICATA. In an action for such a breach of the bond, evidence of matter relating to the conduct of the administration, prior to the decree, held properly rejected, as immaterial and *res adjudicata*.

ERROR from the district court for Cuming county.
Tried below before EVANS, J. *Affirmed.*

Thomas M. Franse, for plaintiffs in error.

Timothy J. Mahoney and *J. A. C. Kennedy*, *contra*.

HASTINGS, C.

There are thirteen assignments of error in this case, but in reality the errors complained of are three: First, error of the trial court in instructing a verdict for plaintiff below, defendant here; second, error of the trial court in rejecting as evidence Exhibit 10 of defendants at the trial, the record of a so-called final settlement of the defendant administrator, Schmela, in 1887; and, third, error in overruling defendant's objection to any evidence in the court below, because the petition showed an action barred by the statute of limitations. Unless the record discloses error in one or the other of these three particulars, the judgment must be affirmed. Errors are alleged in rejecting evidence "which would have shown" various things, but what the evidence was, at which this complaint was directed, we have no means of knowing. The defendant Ferdinand Schmela was, in September, 1878, appointed administrator of the estate of Andrew Bergthold, in Cuming county, Nebraska, and the other defendants were sureties on his bond in the sum of \$1,500. The petition alleges that Schmela entered upon his duties as administrator, and continued to exercise the office until April, 1887, when he ceased to be administrator, but without any final settlement; that in December, 1897, upon a hearing on his final report, a decree was entered by the county court for Cuming county that Schmela pay to the heirs at law of Andrew Bergthold, three in number, the sum of \$1,642.88 each; that two of the heirs assigned their interest to the third, who was plaintiff below; that Schmela did not pay any part of the sums decreed; that plaintiff demanded them. She asked judgment for the whole amount,

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\$4,980.10, and interest from December 31, 1897, when the decree was entered by the county court. The answer of Schmela admits his appointment and qualification as administrator, and the demand for the payment by plaintiff, and denies the remaining allegations. The answer also alleges that Amelia Bergthold, the widow, served as administratrix of the estate of Andrew Bergthold for about a year, and received the personal property, but made no report; alleges that Schmela in April, 1885, accounted for all property in his hands as administrator, and that all the items that constituted the \$4,980.10 claimed by the plaintiff are proceeds of real estate sold by Schmela as agent, and for rents received by him as agent for the real estate of the deceased, and none of it was received as administrator. The answer also pleads the statute of limitations, and that plaintiff could not prosecute the action, because the matter of the final report of Ferdinand Schmela as administrator was pending in the district court of Cuming county on error from the order of the county court. Schmela's sureties, Mortenson and Bley, each filed substantially the same answer. The court, at the trial, instructed the jury to find for the plaintiff against Schmela in the sum of \$4,980.10, and against the sureties in the sum of \$1,500, and entered judgment upon the verdict. Motions for a new trial in substantially the terms of the petition in error were entered separately by the defendants, and were overruled. The judgment against the sureties was superseded, and this action is to reverse the judgment against them. Their bond is conditioned as follows: "Now if the said Ferdinand Schmela shall make and return to the county court within three months a true and perfect inventory of all the goods, chattels, credits, rights, and estate of the deceased which shall come into his possession or to the possession of any other person for him, and out of the same pay and discharge all debts, legacies and charges chargeable on the same, or such dividend thereon as shall be ordered and decreed by the court: to render a true and

just account of his administration to the county court, within one year, and at any other time when required by said court, and to perform all orders and decrees of the county court by the administrator to be performed in the premises, then this obligation to be void, otherwise to remain in full force and effect in law." It will be seen that the action was upon the last clause of the condition in the bond, viz., that the principal should perform all orders and decrees of the county court. This condition of the bond is in accordance with the requirements of the statute. Compiled Statutes, ch. 23, secs. 164, 179.

The instruction of the trial court for a verdict was evidently based upon the proposition that the decree of the county court requiring these payments was valid; that the failure to make them was a breach of the condition of the bond, and the principal was liable for the amount of such payments, and the sureties to the extent of the penalty. Under this view of the law nearly all the allegations of the answers, except the denial of the decree of December 31, 1897, became unimportant. If the foundation of the action was a valid decree of the county court, dated December 31, 1897, manifestly the objection that this action, which was begun December 31, 1898, was barred by the statute of limitations, would have no weight.

An examination of the record shows that due proof was made of the county court's decree, as alleged by the plaintiff. The demand for payment under it, and the refusal, are admitted, as are also the execution of the bond and the assignments to plaintiff by her co-heirs. This would seem sufficient to make out a prima-facie case for the plaintiff. The various matters tendered in evidence by the defense principally related to matters leading up to the decree of the county court of December 31, 1897, and the objection that they were *res adjudicata* seems to have been well taken and properly sustained.

The complaint because Exhibit 10, which is claimed to be a final discharge of defendant Schmela, as administrator, and its confirmation by the district court of Cuming

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county, was rejected when offered as evidence, is not well founded. It is quite possible that a previous final discharge of Schmela as administrator would operate as a discharge of his sureties, notwithstanding that he was a party to subsequent proceedings, and in such subsequent proceedings the decree on which this action is based was obtained. But an examination of the pleadings wholly fails to show anything in the answers by way of alleging any such previous final discharge. If there were such allegations, the evidence itself is of such a character that it would be difficult to say that it would amount to a final settlement and discharge. Indeed, this court in the case of *Bachelor v. Schmela*, 49 Nebr., 37, examined nearly all this evidence, and held that it did not show a final discharge. Whether it did or not, there is no pleading of any such method of release by either the principal or the sureties on this bond. The evidence was rightly rejected.

With the prima-facie case made out by plaintiff, and the evidence of defendant properly refused, there was nothing for the court to do but to instruct for a verdict as it did. It appears, therefore, that there was no error, either in instructing for the verdict, in rejecting the evidence of the so-called final settlement in 1887, or in holding that the action was not barred by the statute of limitations.

It is therefore recommended that the judgment of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

SULLIVAN HOWARD, APPELLEE, v. REIN RAYMERS ET AL.,
APPELLANTS.

FILED MARCH 19, 1902. No. 11,408.

Commissioner's opinion, Department No. 1.

1. **Execution: LEVY: NULLA BONA: FRAUDULENT CONVEYANCE: LIEN OF EXECUTION.** Where an execution has been levied upon a fraudulently alienated piece of real estate after a failure to find goods and chattels, the execution creditor is entitled to proceed at once in equity to set aside the fraudulent conveyance and enforce the lien of the execution.
2. **Homestead: RIGHT: CONTIGUOUS PREMISES: NECESSARY SHOWING.** Where premises are claimed to constitute a part of the homestead of a debtor because adjoining premises are occupied as a residence of debtor's family, it is necessary to show a homestead right in the premises on which the family live.
3. **——: ——: PERMISSIVE RESIDENCE WITH FATHER-IN-LAW.** A mere permissive residence in the family of one's father-in-law, however long continued, will establish no homestead rights in the father-in-law's land.

APPEAL from the district court for Hamilton county.
Heard below before SEDGWICK, J. *Affirmed.*

Othman A. Abbott, for appellants.

Hainer & Smith, *contra.*

HASTINGS, C.

Two questions seem to be presented in this case. The first one relates to the levy and return of an execution on which the creditors' bill which constitutes the action is based. The plaintiffs, having recovered a judgment in the Hamilton-county court, and filed transcript in the district court, procured an execution on which the sheriff indorsed, "After diligent search, I can find no goods or chattels whereon to levy and collect this writ or any part thereof," and then levied it on the premises in question in this action. No return seems to have been made to the execution, but the creditor's suit to set aside a deed of the

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land levied upon was commenced before a return was due. Pending the trial, leave was obtained to make a return to the execution and to file a supplemental petition showing the same. A demurrer to the petition had been previously overruled, and an answer filed. Appellants claim now that these proceedings did not constitute a sufficient foundation for equitable proceedings to set aside the conveyance which is attacked in this action, and cite New York cases, and *Weaver v. Cressman*, 21 Nebr., 675, and *Jones v. Green*, 1 Wall. [U. S.], 330, in support of their position. *Weaver v. Cressman* merely goes to the extent of holding that a non-resident creditor may not proceed to appropriate funds of a non-resident debtor in the hands of the clerk of a court without first showing that the debtor had no attachable property in this state. *Jones v. Green* is simply a holding that, before equity would intervene, an attempt at collection by process of law must have been made, but it also holds that, where the execution has been levied upon property fraudulently conveyed, equity will intervene to make such levy effectual on the ground of vindicating the lien acquired by the execution. The same doctrine is asserted in 3 Freeman, Executions [3d ed.], p. 2316, sec. 430. This was the precise position taken by the trial court in this case, and there seems to have been no error in overruling the appellants' demurrer, or in permitting the supplementary petition.

The other question relates to the merits of the case. It is admitted in appellants' brief that the conveyance was voluntary. It is not disputed that the indebtedness to plaintiff had been incurred before it was made. The conveyance attacked is to be deemed fraudulent, unless the premises covered by it are held to have been exempt as the homestead of defendant Rein Raymers. The land in question appears to have been owned for upwards of twenty years by Rein Raymers, and to have been conveyed by this voluntary conveyance just before plaintiffs' claim against him ripened into a judgment. During all of these years there was no dwelling house on the land in question;

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the residence of Raymers and his wife being during all that time with the latter's parents, on an adjoining eighty acres of land. The evidence fails to disclose any right or ownership on the part of Raymers and his wife in the adjoining eighty on which they lived. It seems to have been a mutual arrangement made for the convenience of the parties, and terminable at the will of either. It is tolerably clear from the evidence that there was no legal estate in this adjoining piece of land held by the appellants, Raymers and wife. The claim sought to be made in the answer is that Raymers and wife held some estate in the land on which they lived with the latter's parents, and that, the other adjoining it, their homestead rights extended to the whole. The sole basis for such claim is the fact that Raymers and wife lived with the latter's parents on this adjoining land during all this time; that they seem to have jointly contributed to the expenses of the joint family, and Raymers controlled his own eighty acres of land, and sometimes farmed, under a rental agreement, some part of that on which he lived with his father-in-law, Zingsheim. But it is impossible to conclude from this evidence that Raymers had any such interest in the Zingsheim land as attached any homestead rights in it on his own part. Of course, if he had no homestead interest in the land on which he lived, no such homestead right would extend to his own property, which adjoined that on which he lived.

No error is discovered in the judgment of the trial court, and it is recommended that it be affirmed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MARY J. FOXWORTHY V. LUCY C. COLBY.

FILED MARCH 19, 1902. No. 10,915.

Commissioner's opinion, Department No. 1.

Material Alteration of Instrument. The unauthorized insertion of the word "gold" before the word "dollars" in an instrument, after its execution and delivery, is a material alteration.

ERROR from the district court for Lancaster county. Tried below before HOLMES, J. *Reversed.*

Charles L. Burr and Lionel C. Burr, for plaintiff in error.

Flansburg & Williams, contra.

DAY, C.

Lucy C. Colby brought this suit in the district court for Lancaster county against Mary J. Foxworthy to foreclose a real estate mortgage executed by her in favor of the Lombard Investment Company, and by that company assigned to the plaintiff. The answer of the defendant alleged that after the execution and delivery of the bond and mortgage they were, without the knowledge or consent of the defendant, fraudulently altered and changed by inserting therein the word "gold" before the word "dollars." The reply was a general denial, and also a plea that defendant had paid nine of the coupons as they became due, and that each of them contained the word "gold" before the word "dollars"; that no protest or objection was ever made by the defendant, but that at all times she expressed a willingness to pay the note and coupons and discharge the debt; by reason of which fact it is alleged the defendant is estopped from interposing the defense sought to be pleaded by the answer. Upon the trial a judgment of foreclosure was rendered, to review which the defendant has brought the case to this court by proceedings in error.

Upon the request of the defendant, a jury was called to

determine disputed questions of fact. In response to a special interrogatory the jury found that the note and mortgage in controversy had been wrongfully altered and changed without the knowledge or consent of the defendant, by inserting therein the word "gold" before the word "dollars." The jury also returned a general verdict for the defendant. We deem the finding of the jury unimportant, as, in an equity case, it is only advisory. *Bank of Stockham v. Alter*, 61 Nebr., 359. Besides, the finding of the court with respect to the alterations in the bond and mortgage was in accord with the finding of the jury. The court found that the defendant had paid the semi-annual coupons, which had likewise been altered, and that all of said coupons had been delivered to the defendant, and that she "might have had knowledge of the change and alteration in said bond and mortgage by exercising due care and diligence," but made no complaint thereof, but continued to pay said coupons in manner and form as therein written. This latter finding constitutes the basis for the judgment of the court. One of the errors assigned is that this finding is not supported by sufficient evidence and is contrary to the evidence. The record is clear that defendant had no knowledge that the coupons had been altered or changed. She swears positively that she never examined them when they were returned to her, except casually to ascertain that they had been stamped paid. The finding of the court was not that she did know of the alteration, but that by exercising due care and diligence she might have known it. We do not think the defendant owed any duty to the plaintiff to examine the coupons as they were returned to her after payment; and, if not, she could not be charged with negligence in failing to examine them. Granting that an estoppel is properly pleaded, the facts proved do not sustain it.

It is practically conceded by counsel for the plaintiff that the reasons assigned in the judgment are hardly sufficient to sustain it, but it is insisted that the ultimate decree awarding a foreclosure was right, and should,

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therefore, be affirmed. It is contended by plaintiff that the alteration of the instruments by the insertion of the word "gold" is an immaterial alteration. We can not assent to this. A material alteration of an instrument is any alteration which causes it to speak a language different in legal effect from that which it originally spoke. *Bridges v. Winters*, 42 Miss., 135, 97 Am. Dec., 443; *Murray v. Klinzing*, 64 Conn., 78; *Wheelock v. Freeman*, 13 Pick. [Mass.], 165, 168; *Oliver v. Hawley*, 5 Nebr., 439; *Fisherick v. Hutton*, 44 Nebr., 122. By the terms of the contract as it was originally made, it could have been satisfied and discharged by the payment of the sum named in any currency which was lawful money at the time of the payment. The contract, as modified, could only be discharged by the payment of a specific kind of money. The defendant was by this change deprived of a legal privilege which she enjoyed under the contract she had made. By this alteration the legal effect of her contract was changed. The rule is well settled in this state that a material alteration of a promissory note renders it void, even in the hands of a bona-fide purchaser. *Brown v. Straw*, 6 Nebr., 536; *Savings Bank v. Shaffer*, 9 Nebr., 1; *Huribut v. Hall*, 39 Nebr., 889; *Erickson v. First Nat. Bank*, 44 Nebr., 622. The plaintiff cites the case of *Bridges v. Winters*, 42 Miss., 135, to the point that the insertion of the words "in gold" in a promissory note is not a material alteration. An examination of the reasons announced by the court in the case does not support the contention made for it. In the course of the opinion the court says: "The legal liability of the plaintiffs in error on the note in question seems to us the same without the words 'in gold' inserted as with them. The law at the date of this note fixes the legal liability of the plaintiffs in error as to the kind of funds or money this note should be paid in. * * * Could Harris legally discharge or pay money due on the note on the 25th day of May, 1860, in any other currency than gold? He could not." It thus appears that in that case the alteration was held to be immaterial, because

it did not change the legal effect of the note as it was originally made. The rule is well established that contracts to pay a certain number of dollars in gold are enforceable. In *Bronson v. Kimpton*, 75 U. S., 444, it was held that a mortgage given to secure a bond payable in gold was not satisfied by a tender of United States notes equal in nominal amount to the sum named in the bond. *Hittson v. Denverport*, 4 Colo., 169; *McGoon v. Shirk*, 54 Ill., 408; *Phillips v. Dugan*, 21 Ohio St., 466; *Walkup v. Houston*, 65 N. Car., 501. It is urged by plaintiff's counsel that, conceding the alteration in the instruments to be material, still it is not shown that the change was made by any party to the transaction, or by any person in privity with him, or by his consent. And it is argued that if the alteration was done by a stranger, it is a mere spoliation, and the rights of the parties are not affected thereby. There is no doubt that if an instrument is changed by a stranger, without the consent of the parties to it, that the rights of the holder will not be affected thereby. *Walton Plow Co. v. Campbell*, 35 Nebr., 173. We fail to see the application of the rule here invoked to the case under consideration. Not only was the contract as changed sought to be enforced, but proof was taken of the officers and employees of the Lombard Investment Company for the purpose of showing that the word "gold" was in the contracts at the time the instruments were executed. One of the witnesses testified that the word "gold" was stamped before the word "dollars" upon all the blanks and forms used by the company at the time the loan was made, and the form of the coupon and mortgage in suit was the form in use at that time. The disputed question in the court below was whether the word "gold" was in the note and mortgage when the instruments were signed and delivered.

We therefore recommend that the judgment be reversed and the cause remanded to the district court for further proceedings.

HASTINGS and KIRKPATRICK, CC., concur.

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By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded.

REVERSED AND REMANDED.

THOMAS GANNON v. J. R. PHELAN, ADMINISTRATOR, ET AL.

FILED MARCH 19, 1902. No. 11,241.

Commissioner's opinion, Department No. 1.

1. **Appeal Bond: OBLIGEE.** A bond given for the purpose of taking an appeal under the provisions of section 311 of chapter 23, Compiled Statutes, which runs to "the state of Nebraska" as obligee, instead of to the judge of the probate court, as required by said section, is not by reason thereof void.
2. ———: ———: **AMENDMENT: NISI-ORDER: DISMISSAL.** If the appellee is dissatisfied with the form of the bond, the appropriate practice is to move in the appellate court for an order requiring a new bond to be filed within a time designated by the court, and in default thereof that the appeal be dismissed.
3. **Peremptory Dismissal: ERROR.** In such case it is error to peremptorily dismiss the appeal without giving to appellant the opportunity to give a new bond.
4. **Right of Appeal.** By section 42, chapter 20, Compiled Statutes, a right of appeal is given to any person affected by any final order, judgment or decree of the county court in all matters of probate jurisdiction.
5. **Sufficient Facts.** Sufficient facts are shown in the record to authorize the appellant to appeal.
6. **Quaere.** Whether Thomas Gannon, as administrator, has the right to appeal, not determined.

ERROR from the district court for Box Butte county.
Tried below before WESTOVER, J. *Reversed.*

Francis A. Brogan and William L. McLaughlin, for plaintiff in error.

Nathan K. Griggs, contra.

DAY, C.

This is a proceeding in error to review a judgment of the district court for Box Butte county, dismissing an appeal from a judgment of the county court of said county, in the estate of Maggie Gannon, deceased. The record shows that Thomas Langan filed a petition in the county court for Box Butte county, alleging that on October 4, 1898, Maggie Gannon died in Deadwood, Lawrence county, South Dakota, leaving no last will and testament; that she was possessed of certain real and personal property in Box Butte county; that petitioner was the father of the deceased; that Thomas Gannon was her surviving husband, and that there were no other heirs or representatives; and praying that an administrator be appointed. Upon this application J. R. Phelan was appointed administrator of said estate, and duly qualified and acted as such. On July 15, 1899, an order was entered approving the final account of said administrator, and directing the distribution of the personal assets, and ordering all of them to be delivered to Thomas Langan. An order was also entered as to certain real estate belonging to the estate. On July 17, 1899, Thomas Gannon applied to the court for an order fixing the amount of a bond for an appeal to the district court, and, upon hearing, the amount of such bond was fixed at \$300, which was duly executed and approved by the court within the time allowed by law. This bond was signed by Thomas Gannon personally, and also by him as administrator of the estate of Maggie Gannon, deceased, appointed by the county court for Lawrence county, South Dakota, and also by the proper sureties. The obligee named in the bond was "the state of Nebraska." A duly certified transcript of the proceedings in the county court was filed in the district court on August 5, 1899, within the time prescribed by law. J. R. Phelan, as administrator, thereupon filed a motion to dismiss the appeal on the following grounds: "(1) That said appeal has not been had nor taken in the manner required by law; (2) that

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no bond upon or for such appeal has been given or executed by appellants as required by law; (3) that appellants are not authorized by law to unite in the appeal of said cause to this court; (4) that the appellants are not and were not aggrieved by the order or decree appealed from, had and rendered by the court below; (5) that Thomas Gannon, as administrator, under appointment in the state of South Dakota, is not entitled to appeal this matter to this court, it appearing that appellee herein has been appointed as administrator of the estate of said deceased within the state of Nebraska, nor are said two appellants entitled jointly to have or maintain this appeal to this court." This motion was sustained and the appeal dismissed. To reverse this order Thomas Gannon prosecutes error.

The first and second subdivisions of the motion can be considered together, as they relate to objections based upon the form of the undertaking for appeal. The record shows that the appeal bond was filed within the time prescribed by law, and was duly approved by the judge of the probate court. This bond, however, ran to "the state of Nebraska" as obligee, instead of to the judge of the probate court, as required by section 311 of chapter 23 of the Compiled Statutes of 1901. It is urged that this defect is fatal to its validity, and that the district court acquired no jurisdiction of the case, and hence a dismissal of the appeal was the proper order to be made. The undertaking, although informal and irregular, is not, in our opinion, void, and was sufficient to invest the district court with jurisdiction. In bonds of this character the obligee is only a nominal party, and under our practice a suit upon it would be brought, not in the name of the obligee, but in the name of the party entitled to the protection of the bond. Cases involving questions of similar import have been considered by this court, and bonds running to an obligee other than the obligee designated by the statute have been held to be good. In the case of *Huffman v. Koppelkom*, 8 Nebr., 344, it was held: "The official bond of a sheriff is not void by

reason of its being given to the state, instead of the proper county, as obligee. This is but an irregularity which in nowise affects the liability of the sheriff or his sureties, in an action thereon for damage occasioned by official misconduct." In *Thomas v. Hinkley*, 19 Nebr., 324, it was held that a liquor dealer's bond, given to the village of Hebron instead of the state of Nebraska, was not therefore invalid, and that an action could be maintained upon it by any person aggrieved. But, conceding that the bond was irregular in form, and open to attack, the proper practice was for the district court to have required an amended bond to be filed within a reasonable time, and then, if not complied with, to enter an order of dismissal. In *Chase v. Omaha Loan & Trust Co.*, 56 Nebr., 358, an appeal bond had been signed by a practicing attorney, who, under the provisions of the statute, is not a proper person to become surety upon an appeal undertaking. On motion, the appeal was dismissed for want of a proper appeal bond. The court said: "If the appellee was dissatisfied with the appeal bond for any reason, the appropriate practice would have been to file a motion in the appellate court for an order requiring a change or renewal of the bond within a time to be fixed by the court, and on a failure to comply with such order enter a dismissal. *Galligher v. Wolf*, 47 Nebr., 589. The district court gave no opportunity to the appellant to give a new bond, but peremptorily dismissed the appeal. This was substantial error." *Rube v. Cedar County*, 35 Nebr., 896. In *Jacobs v. Morrow*, 21 Nebr., 233, it is said: "Where a bond has been duly approved by the officer whose duty it was to approve the same, it will be presumed that it conformed in all respects to the requirements of such officer, and it will not be void, even though some of the formalities of the law have not been complied with, provided the bond is filed within the time fixed by statute. The appellate court may permit or require a new bond to be filed, and will not dismiss an appeal where it is possible by an amendment to correct or replace an erroneous bond."

The other grounds of objection urged by the motion are, we think, without merit and to avoid repetition, will be considered together.

The record shows that Thomas Gannon was the surviving husband of Maggie Gannon, deceased. He was an interested party in the distribution of the assets of the estate. As the husband of the deceased, he was entitled to a life estate in the real estate, and entitled to an accounting from the administrator for the rents collected by him during his incumbency of the office of administrator. The order complained of, approving the final account of the administrator and distributing the assets, was one which affected him, and from which he had the right to appeal. Section 42 of chapter 20 of the Compiled Statutes provides as follows: "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment or decree of the county court to the district court by any person against whom any such order, judgment or decree may be made or who may be affected thereby." It seems clear that under this section Thomas Gannon had the right to appeal. The mere fact that the bond was also signed by "Thomas Gannon, as administrator of the estate of Maggie Gannon, deceased, duly appointed, qualified and acting in the county court of Lawrence county, South Dakota," does not in any manner affect the rights of Thomas Gannon individually in this appeal. We do not deem it necessary to a determination of the case now before us to decide whether Thomas Gannon, as administrator, was an interested or "aggrieved party," so as to entitle him in his official capacity to take an appeal from the order of the county court. If he was, there is no reason why he might not have joined with Thomas Gannon as an individual in this appeal. If he was not, then that portion of the bond and proceedings in appeal referring to him in his capacity as administrator may be treated as mere surplusage. The appeal brings the entire case up for review. The rule is now firmly established that, when any party or parties affected by a judgment or order file a sufficient bond, and

afterwards file a transcript within the time provided by law, the appellate tribunal is possessed of jurisdiction of the case. *McHugh v. Smiley*, 17 Nebr., 626; *Clafin v. American Nat. Bank*, 46 Nebr., 884. The appeal in this case does not involve any question as to joint or separate proceedings which might arise in a petition in error. Whether the appeal could be properly taken by Thomas Gannon personally, or by him as administrator, or whether he could appeal in both capacities, were not matters to be determined on a motion to dismiss the appeal. The fact that some one who was interested and affected by the order complained of had executed the required undertaking, which was duly approved, and that a transcript was filed in due time in the district court, was sufficient to give the court jurisdiction. In *Bower v. Cassels*, 59 Nebr., 620, it is held that an objection because of an alleged defect of parties "goes to the merits of the case, and can not be disposed of on a motion to summarily dismiss the appeal."

We are convinced that the district court erred in dismissing the appeal. We therefore recommend that the judgment be reversed and the cause reinstated in the district court.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause reinstated for further proceedings.

REVERSED AND REMANDED.

JAMES R. C. FIELD ET AL. V. NATIONAL COUNCIL OF KNIGHTS
AND LADIES OF SECURITY.

FILED MARCH 19, 1902. No. 11,267.

Commissioner's opinion, Department No. 1.

1. **Insurance:** MUTUAL BENEFIT ASSOCIATION: PAYMENT OF ASSESSMENTS: DEFAULT: SUSPENSION WITHOUT NOTICE: BY-LAWS: SELF-EXECUTING PROVISIONS. By-laws of a mutual benefit association, providing for the payment of assessments made during the month on a certain day, and for suspension, without notice, of members in default, are self-executing, and the suspended member is not entitled to notice.
2. **Local Council:** FINANCIAL SECRETARY: IMPLIED AUTHORITY: PAYMENT OF ASSESSMENTS: WAIVER. The financial secretary of a local council in such an order has no implied authority to waive any of the provisions of the by-laws governing the payment of assessments.
3. **Sick Benefits:** BY-LAWS. In order to obtain sick benefits as provided in the by-laws, a member must bring himself within their terms.

ERROR from the district court for Gage county. Tried below before LETTON, J. *Affirmed.*

F. N. Prout, Griggs, Rinaker & Bibb and S. D. Killen,
for plaintiffs in error.

George A. Huron and George A. Murphy, contra.

DAY, C.

The plaintiffs bring this proceeding in error to review a judgment of the district court of Gage county, based upon a verdict for the defendant returned in obedience to the peremptory direction of the trial court. The defendant is a fraternal mutual benefit association organized under the laws of the state of Kansas, with its head office at Topeka, and licensed to transact business in Nebraska. The defendant organization is founded upon the lodge system, with subordinate councils in various cities, having a ritualistic form of work, and embracing in its scope fraternal

and social features, as well as indemnity in case of disability or death. The insured died April 14, 1897. In her lifetime, Jennie E. Field became a beneficiary member of one of these subordinate councils, located in the city of Beatrice, Nebraska; and on January 14, 1895, there was issued to her a beneficiary certificate, whereby the defendant agreed in case of her death to pay to certain beneficiaries named therein the sum of \$3,000, subject to certain conditions and stipulations, one of which was as follows: "This certificate is issued upon the express condition that the said insured shall, in every particular, while a member of the order, comply with all the laws, rules and requirements thereof, and shall at her death be a member in good standing of said order." The by-laws of the association provided for the payment by its beneficiary members of certain fixed assessments upon the death of any member entitled to participate in the beneficiary fund, which sum was to be paid to the local treasurer of the council within a given period, and in default of such payment the beneficiary certificate lapsed and became suspended. The by-laws also contained provisions for suspension of its beneficiary certificates for the non-payment of quarterly dues. The by-laws also contained liberal provisions for the reinstatement of any suspended member within a given period from the date of suspension. These need not be set out, as it is not contended that the insured was reinstated after her suspension. Section 11, article 14, of the by-laws provided as follows: "Any member suspended or expelled from the order for any cause whatever, forfeits all claims to the beneficiary fund during said suspension or expulsion." The record is clear that the insured did not pay the assessment made for the benefit of the beneficiary fund for the month of June, 1895, or for any of the following months during that year, although assessments were made in each month. Neither did she pay her quarterly dues during that period. For the failure to pay the dues and assessments she was suspended by the action of the local council, and her name was stricken

from the rolls of the local council, as well as the national council, in July, 1895. No attempt was made to be reinstated, although her husband, who transacted the business for her, was repeatedly importuned by members of the local council to pay up the arrearages and have her reinstated. The plaintiffs do not deny the failure of the insured to pay the assessments and dues, or that she was suspended for such failure, but seeks to avoid the effect thereof upon three grounds, which will now be considered.

It is first insisted that the insured never had any notice of her suspension from the local council, and therefore she is not bound thereby. A careful examination of the rules respecting the suspension of members indicates that no notice of suspension to its members is required. In this respect the rules are self-executing. Section 3, article 14, of the by-laws refers especially to the subject of suspension for the non-payment of assessments, and, among other things, provides as follows: "The certificate of each member who has not paid such assessment on or before the 28th of said month shall, by the fact of such non-payment, stand suspended, and no action on the part of the council or any officer thereof shall be required as essential to such suspension." These provisions of the by-laws are clear and explicit that no notice of suspension is required.

The next contention of the plaintiffs is based upon the plea of a waiver of the prompt payment of the dues and assessments by an agreement with the financial secretary of the local council, whereby the time of payment of the beneficiary assessments on the certificate was extended to January, 1896. The testimony of the plaintiffs and defendant upon this phase of the case presents the only conflict of evidence in the record. The husband of the insured testified that he paid the dues of his wife owing to the local council up to and including July, 1895, and at that time he had a conversation with the financial secretary of the local council, which is developed by the following questions and answers:

Q. Now just state to the jury what conversation you

had, if any, in July, 1895, with H. S. Woodruff, financial secretary of the defendant, the Knights and Ladies of Security, in relation to the further payment of assessments and local lodge dues for the next ensuing six months.

A. Why, I went to Mr. Woodruff's place of business and he told me that I didn't need to pay the assessment. He said that I could let it run until January, and wouldn't be running any risk whatever.

Q. What, if anything, did he say at that time in relation to paying the local dues?

A. Why, he said if I kept up the local dues, why the others could run six months. That would be January, 1896.

Q. In relation to all other dues and assessments, except the local dues, what did he say in relation to giving time upon them, if anything?

A. Why, he said if I would pay the local dues, why I could have six months' time on the other, and wouldn't be running any risk.

The testimony was received over the objection of the defendant that it was seeking to change the constitution and by-laws of the national council in relation to dues, fees and assessments by the parol evidence of a subordinate officer of the local lodge. While this evidence respecting the extension of time of payment, etc., was denied by Woodruff, the former financial secretary of the local council, still, if it was competent to be considered in evidence, then a disputed question of fact is presented, which, under the well recognized rule in this state, should have been submitted to the jury. We do not think the evidence of Field, above quoted, was admissible. Nowhere in the constitution and by-laws of the defendant society is authority conferred upon the financial secretary of a subordinate council to make the contract claimed to have been made, or to waive the prompt payment of the assessments. It was not sought to be shown that Woodruff had any special authority to make the agreement. His official position as an officer of the local council alone is relied upon as such

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authority. The case of *Borgraefe v. Knights of Honor*, 22 Mo. App., 127, is so in point upon the question here presented that we quote therefrom with approval as follows: "The subordinate lodges are no doubt the agents of the supreme lodge in dealings with the members for many purposes, and in those cases where the subordinate lodges act through their ministerial officers, and where the latter act is in conformity with the rules governing the lodges and the order, these officers may become *pro hac vice* the agents of the subordinate lodges. But it is not shown to us that these officers are anywhere endowed with power to set aside the rules of the order, or that the subordinate lodges are endowed with such a faculty. On the other hand, it is perceived by the provisions of the laws of the order above quoted, that no grand lodge has power even to alter or amend the laws governing the subordinate lodges. The doctrine of waiver, which is often appealed to to prevent forfeitures in the case of policies of insurance, has no application to the forfeitures of memberships in these orders. The laws and rules governing the different branches of such an order are in the nature of contracts among all the members, and, considering the widespread extent of these organizations, and the very great extent to which these schemes of benevolence have taken the place of life insurance, especially among the working classes, it is highly important as a principle of public policy that, in cases of this kind, their rules and regulations should be substantially upheld by the judicial courts." *State v. Temperance Benevolent Ass'n*, 42 Mo. App., 485; *Karcher v. Supreme Lodge Knights of Honor*, 137 Mass., 368; *Hall v. Supreme Lodge Knights of Honor*, 24 Fed. Rep., 450; *Rood v. Railway, etc., Ass'n*, 31 Fed. Rep., 62.

Lastly it is urged that by reason of the sickness of Jennie E. Field, from which she never recovered, she was not bound to pay her beneficiary assessments, but, under the rules of the society, it was the duty of the subordinate council to pay the same, and keep her in good standing in the order. The constitution contains a provision respect-

ing sick benefits to be paid to those members who are unable to follow their usual business avocations, but only in the manner prescribed by the by-laws. The receipt of these benefits by any member of the order is conditioned upon the member coming before the council and making a statement "that owing to sickness of himself or family, or from lack of employment, that he is unable to pay his assessment." It is then made the duty of the president to appoint a committee of three to look into the matter, and if they find the case as stated, the council shall then keep the member in good standing until such time as the member is able to resume his payments. There is no proof in the record which even tends to show that the insured ever took any of the necessary steps to entitle her to receive sick benefits, or to impose upon the local council the duty of keeping her assessments paid.

There was no competent testimony which raised a disputed question of fact, and it was therefore the duty of the court to direct a verdict. We think the action of the trial court in directing a verdict for the defendant is clearly right.

We therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

NOTE.—The following decision has been rendered by the State Insurance Department:

"LINCOLN, NEBR., Sept. 11, 1902.—*Hon. W. F. Bryant*—DEAR SIR: Replying to your favor in the matter of beneficiary under a certificate issued by a fraternal beneficiary society, or more particularly whether or not an organization known as the Franciscan Sisterhood can under our laws become a legal beneficiary, and if not can payment by such a society be legally made to a grandson of the insured?"

"The general rule is that where a statute of a state designates who can become beneficiaries then no others can be made the legal beneficiaries. The laws of this state authorizing such companies to in-

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corporate or transact business in the state in section 94, chapter 43. Compiled Statutes, provides that 'payment of death benefits shall only be made to the families, heirs, blood relations, affianced husband or affianced wife of or to persons dependent upon the member.' I am of the opinion that as such organizations as the Franciscan Sisterhood or any other organization is not mentioned or contemplated in the law, in case of death of the insured payment under a certificate could not legally be made to such a sisterhood.

"I am also of the opinion that a grandson of insured is not such relationship to insured as is contemplated in the section above recited; consequently could not legally become the beneficiary under a certificate issued by such an order. If the grandson is under age, it might be possible for the insured to adopt him and thereby make him the legal beneficiary. Yours truly,

"CHARLES WESTON, Auditor.

"H. A. BABCOCK, Deputy, Insurance Department."

Insurable Interest in the Life of the Assured.—Policy payable to religious society—on the life of one of its members. *Trinity College v. Travelers' Ins. Co.*, 18 N. E. Rep. [N. Car.], 175.

Relatives.—"The natural affection in cases of this kind[,] is considered more powerful—as operating more efficaciously—to protect the life of the assured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured." *Warnock v. Davis*, 104 U. S., 779. A *sister* has an insurable interest in the life of a *brother* from mere relationship. *Ætna Life Ins. Co. v. France*, 94 U. S., 561; but see *Lord v. Dall*, 12 Mass., 115, 7 Am. Dec., 38. A *brother* has no insurable interest in the life of a *brother*. *Lewis v. Phœnix Mutual Life Ins. Co.*, 39 Conn., 100. A *wife* has an insurable interest in the life of her *husband*. Divorce subsequent to such policy, does not vitiate such policy. *Connecticut Mutual Life Ins. Co. v. Schaefer*, 94 U. S., 457; *McKee v. Phœnix Ins. Co.*, 28 Mo., 383. A woman living with a man to whom she is not married, has an insurable interest in his life. *Equitable Life Assurance Society v. Patterson*, 41 Ga., 338. If the beneficiary is the wife of the insured, the fact that she is named in the policy by another name, does not vitiate the policy. *Durian v. Central Verein*, 7 Daly [N. Y.], 168. A *fiancée* has an insurable interest in the life of her *betrothed husband*. *Chisholm v. National Life Ins. Co.*, 52 Mo., 213. Mere relationship does not give the *son* an insurable interest in the life of the *father*. *Guardian Mutual Life Ins. Co. v. Hogan*, 80 Ill., 35, 22 Am. Rep., 180. A *grandson* has an insurable interest in the life of a *grandfather* who resides with him. *Elkhart Mutual Aid Ass'n v. Houghton*, 103 Ind., 286. A *mother* has an insurable interest in the life of her *son*. *Reef v. Union Life Ins. Co.*, cited 18 Central Law Journal, 347. An *adopted son* has an insurable interest in the life of his *foster father*. *Carpenter v. U. S. Ins. Co.*, 28 Atl. Rep., [Pa.], 943. Mere relationship does not give a *daughter* an insurable interest in the life of her *mother*. *Continental Life Ins. Co. v. Volger*, 89 Ind.,

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572. A *grandchild* has no insurable interest in the life of a *grandparent*. *Burton v. Connecticut Mutual Life Ins. Co.*, 119 Ind., 207. An *uncle* has no insurable interest in the life of a *nephew*. *Singleton v. St. Louis Mutual Ins. Co.*, 66 Mo., 63, 27 Am. Rep., 321. A *nephew* has no insurable interest in the life of an *aunt* (*Appeal of Corson*, 113 Pa. St., 438); nor a *son-in-law* in the life of a *mother-in-law* (*Rombach v. Piedmont Ins. Co.*, 35 La. Ann., 233). In a number of cases, it has been declared that relationship *ipso facto* gives the *parent* an insurable interest in the life of the *child*, except (as stated in some cases) when the child is of age, and *vice versa*. *Mitchell v. Union Life Ins. Co.*, 45 Me., 104. *Valley Mutual Life Ass'n v. Teewalt*, 79 Va., 421.—REPORTER.

DAVID C. JOHN, APPELLANT, v. WIELIAM J. CONNELL ET AL.,
APPELLEES.

FILED MARCH 19, 1902. No. 9,373.

Commissioner's opinion, Department No. 1.

1. **Board of Equalization: MEETING: NOTICE.** Where the record discloses that a board of equalization remained in session only a portion of the day provided for in the published notice, when a recess was taken subject to the call of the chairman, and no further meeting held until nearly thirty days thereafter, when, without a new notice, another meeting is held, at which final action is taken, *held*, that such action is not a compliance with the law requiring a meeting of the city council as a board of equalization for at least one day, between the hours of 9 A. M. and 5 P. M., and a special tax depending for its support upon such proceedings is invalid. *Medland v. Linton*, 60 Nebr., 249, followed.
2. **Levy: SPECIAL TAX: FOOT-FRONTAGE: BENEFITS: EQUAL AND UNIFORM.** Under the provisions of section 78, chapter 12a, Compiled Statutes 1893, in order to sustain a levy of special taxes according to the foot-frontage of the lots of real estate within the tax district, it must affirmatively appear from the record that the council, sitting as a board of equalization, found that the benefits were equal and uniform as to all the lots and tracts to be affected by the proposed improvement.
3. **Former Opinion Modified.** Former opinion in this case (*John v. Connell*, 61 Nebr., 287) modified so far as it is inconsistent with the views herein expressed.

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APPEAL from the district court for Douglas county. Heard below before POWELL, J. Rehearing of case reported in 61 Nebr., 267. *Judgment below affirmed in part.*

Henry P. Leavitt, for appellant.

Connell & Ives, contra.

KIRKPATRICK, C.

This case is again before this court for determination, a rehearing having been allowed. The prior opinion of this court is reported in 61 Nebr., 267. We are asked upon this rehearing to examine only the question concerning the validity of the sewer tax, which the trial court held invalid, and which in the former opinion was held valid. It will not be necessary herein to restate the pleadings, issues and the relations of the several parties to the case. Regarding the question now to be determined, this court, in the former opinion, said: "Our examination of the record has not revealed any vital infirmity in the proceeding which resulted in the levy of the sewer tax, and defendant has not pointed out, or even suggested, the existence of any substantial defect in such proceeding. We conclude, therefore, that the special sewer tax is valid, and that the court erred in not enforcing it." Appellee, in his motion and brief on rehearing, calls attention to the fact, which before was not brought to the notice of the court, that this question was not properly before the court at the former hearing; the decree of the trial court having been that the sewer tax was invalid, and appellant, John, not having filed his brief here upon this question within the time required by the rules, appellee Connell having had no notice that appellant, John, had filed his brief upon this question out of time. In view of these facts, this rehearing has been granted, and the only point, therefore, requiring reexamination, is whether that portion of the decree of the trial court holding the sewer tax invalid, from which appellant,

John, attempted to appeal, was properly reversed, and the special sewer tax held valid.

It is now contended by appellee Connell that the sewer tax was illegal and void for the following reasons: First, that the board of equalization failed to comply with the law in respect to remaining in session for one day, between the hours of 9 A. M. and 5 P. M., to hear complaints regarding the assessment; and that the board of equalization made no finding authorizing the levy by front-footage, and that no final action whatever was taken by the board; second, that no assessment was in existence or had been made at the time the council, sitting as a board of equalization, claimed to have held its meeting; third, that no notice of the meeting of the board of equalization was published as required by law, and that the notice as published was insufficient. These objections, so far as necessary to a correct disposition of the question now before the court, will be taken up in the order named.

The authority to levy the tax complained of is found in section 78, chapter 12a, Compiled Statutes, 1893, by the terms of which the city, by its proper officers, is authorized to levy a tax for the construction or reconstruction of sewers or drains within the city limits; the taxes to be assessed against the real estate lying within the sewerage district to the extent of the benefits to such property by reason of the improvement. These benefits are to be determined by the council, sitting as a board of equalization, after notice to property owners, as in the case of other special assessments. Section 85 of the same act provides: "In all cases before any special taxes that may be levied, except for constructing wood sidewalks, shall be finally levied, it shall be the duty of the council to sit as a board of equalization for the purpose of equalizing any such proposed levy of special taxes or assessments and correcting any error therein, giving notice of such sitting in the same manner as above provided in this section, stating in such notice the purpose for which it will sit, and it shall continue such session not less than one day, from **nine A. M.**

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to five P. M., and at such session it shall hear all complaints," etc. It is disclosed by the record in this case that a meeting of the city council of the city of Omaha was held at the office of the city clerk, in the Douglas county court house, on the 13th day of July, 1891, in accordance with the terms of a notice published, which provided that the session should extend from 9 A. M. till 5 P. M. The record discloses that the members of the city council (naming them) met at the clerk's office on the day named, and organized as a board of equalization by electing one of their members as chairman. Some business was transacted, having no connection with the question under consideration, after which the record recites that the board, on motion, took a recess, to meet upon the call of the chairman. No other meeting appears to have been held until August 11, 1891, when the board of equalization was again in session, apparently upon the call of the chairman. Aside from this record, the only evidence is the testimony of one Cochrane, who was interested in some other matter, who appeared before the board on the 13th of July, who testified that the board took the recess mentioned in the minutes of the board prior to noon on that day. Is this a compliance with the plain provisions of the statute, requiring the council to remain continuously in session as a board of equalization for at least one day, from 9 A. M. until 5 P. M.? Clearly it is not. The language is too plain to admit of construction. Beyond question, it is the purpose of this enactment that the taxpayers whose property was to be affected should have an entire day, between the hours named, to appear and show any errors or irregularities that might exist in relation to such taxes. It is contended by appellant that section 78 of the act referred to above is complete in itself, and that no time is fixed therein during which the board of equalization must remain in session. We are unable to find merit in this contention. Section 85 of the same act, a portion of which has been quoted, provides that in all cases, before special taxes can be levied, the board must hold a meeting to hear complaints,

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at least one day, between the hours named. This precise question has been before this court in the case of *Medland v. Linton*, 60 Nebr., 249, in which this court, speaking by HOLCOMB, J., held, in reference to a record almost identical with that in the case at bar, that the attempted compliance with this provision was insufficient to sustain a levy of special taxes. In that case it was held to be the settled rule in this state that compliance with the provisions requiring a minimum session of one day between the hours named was a jurisdictional prerequisite to the validity of the assessment sought to be made, and that its observance must appear affirmatively from the record; quoting with approval from *Smith v. City of Omaha*, 49 Nebr., 883. We have no doubt of the correctness of the rule announced in that case. It follows that, the city council having failed to meet as a board of equalization and remain in session for at least one day between the hours named, the attempted special assessment complained of was wholly void.

The next contention for consideration is that the special assessment complained of is illegal and void because the city council, as a board of equalization, in adopting the frontage rule for the purpose of making the levy, failed to make a finding as required by section 78, that the benefits arising from the construction of the improvement contemplated would be equal and uniform. It seems clear, from the plain provisions of the section referred to, that in order to authorize a levy according to the front foot of the lots of real estate within the sewerage district, the council, sitting as a board of equalization, must have found that the benefits would be equal and uniform upon all the lots, tracts and parcels of land in the district. The record wholly fails to disclose that any such finding was made, or that the board took the same under consideration. There can be no question that such a finding is a jurisdictional prerequisite to the levy of a special tax in the manner attempted. *Hayes v. Douglas County*, 65 N. W. Rep. [Wis.], 482, 486; *State v. City of Hudson*, 29 N. J. Law, 104; *Liebermann v. City of Milwaukee*, 89 Wis., 336.

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From what has been said, it clearly appears that the judgment of the trial court in holding this special sewer assessment invalid was right. It is therefore recommended that the opinion heretofore rendered in this cause, reported in 61 Nebr., 267, be modified to the extent that it conflicts with the views herein announced, and that the judgment of the trial court, holding the sewer tax invalid, be affirmed.

HASTINGS and DAY, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former opinion is modified and the judgment of the district court holding invalid the special sewer tax affirmed.

JUDGMENT ACCORDINGLY.

NOTE.—The principle underlying special assessments upon private property to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited and therefore that the owners do not in fact pay anything in excess of what they receive by reason of such improvement. The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation, but, unless such excess of cost over special benefits be of a material character, it ought not to be regarded by a court of equity, when its aid is invoked to restrain the enforcement of a special assessment. *Norwood v. Baker*, 172 U. S., 269, opinion by Justice Harlan, Brewer, J., dissenting. In the case just cited, a village corporation by its council condemned certain land for a street extension. In a condemnation proceeding, the jury fixed the damages at \$2,000. As the extension of the street passed through the land, the special assessment by front foot was assessed for each side of the street, and amounted to \$2,218.58, or \$218.58 in excess of verdict for damages. The assessment was perpetually enjoined as in violation of the fourteenth amendment of the constitution of the United States.—REPORTER.

THEODORE F. DECKER, APPELLEE, v. RUDOLPH DECKER, APPELLANT, ET AL., APPELLEES.

FILED MARCH 19, 1902. No. 10,396.

Commissioner's opinion, Department No. 1.

1. **Deed Absolute in Form: GIVEN TO SECURE DEBT: PAROL DEFEASANCE.** In equity an unrecorded deed absolute in form, given to secure a debt, with parol defeasance, is a mortgage; and when the debt secured thereby is paid, and the deed surrendered to the grantor for destruction, the lien of the mortgagee is extinguished, and the title reverts absolutely in the mortgagor if the rights of innocent third parties have not intervened.
2. ———: ———: ———: **POSSESSION: RENTS AND PROFITS.** In such case, if the grantee in the mortgage deed takes possession of the premises under an agreement with the grantor or mortgagor that the rents and profits shall go to pay taxes and compensate the mortgagee for the trouble in caring for the premises during the mortgagor's absence, the mortgagee can not acquire title by adverse possession.
3. **Essence of Estoppel.** It is of the essence of estoppel that the estoppelasserter has relied to his disadvantage upon the conduct or silence of the other party.
4. **Estoppel: KNOWLEDGE.** Under the facts in this case, *held*, that defendant was not estopped from asserting his title to the land for having received his pro-rata share of rents and profits collected by the administrator who took possession of his land supposing it to be that of the intestate, he being at the time in a distant state, and there being nothing in the record to connect him with knowledge that the rents were derived from land to which he claimed title.
5. **Deed in Fact Mortgage: FINDING OF TRIAL COURT CAN NOT BE SUSTAINED.** Where the uncontradicted evidence shows that a deed, absolute in form, was in fact a mortgage, that the debt secured thereby had been discharged and the deed surrendered and destroyed, a finding by the trial court that the title vested in the grantee absolutely, and at her death descended to her heirs at law, can not be sustained.
6. **Evidence.** Evidence examined, and *held* not to sustain the finding and judgment of the trial court.

APPEAL from the district court for Cass county. Heard below before RAMSEY, J. *Reversed.*

Jefferson H. Broady and J. E. Douglas, for appellant.

Matthew Gering and Beeson & Root, contra.

KIRKPATRICK, C.

This is a suit brought in the district court for Cass county by Theodore F. Decker against Rudolph Decker and others to quiet title to the southeast quarter of section 7, town 12 north, range 11 east in said county and to have partition of the land. Plaintiff and the principal defendants in this suit are the children of Jefferson Decker and Rosan Decker. Theodore F. Decker, plaintiff, made all of his brothers and sisters defendants in this suit because they declined to join as plaintiffs. The real controversy is between Rudolph Decker, defendant, who was the owner of the land described, and all the other defendants, who were interested in having the land decreed to be a part of the estate of their mother, Rosan Decker, deceased. Some time prior to 1857, Jefferson and Rosan Decker, husband and wife, removed from Pennsylvania to Cass county, this state. Rudolph, their eldest son, patented the land in controversy in 1857, the patent being issued by the government in 1860. Some time in the year 1859 Jefferson Decker died, leaving a will, by which he bequeathed all of his property to Rosan Decker during her lifetime. Rudolph remained with his mother for some seven years after his father's death, helping to work the home farm, as well as improving the land in controversy. In 1864 or 1865 he decided to go to Montana or some other western state, and upon his departure executed to his mother a deed to the land in dispute, which was never recorded. Rosan Decker, the mother, died in 1892. She had been a very thrifty woman, kept and improved all the land owned at the death of her husband, looked after and improved somewhat the land in controversy, and at the time of her death had accumulated property of the value of \$50,000, about \$15,000 of which was in cash and on deposit in various

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banks. Rudolph, after he left home in 1864 or 1865, came back twice, once in 1875 and again in 1884, and came back a third time shortly after the death of his mother. The other children had all married and left home, and for many years prior to her death the mother had lived alone or with her tenants, on the home place. Upon the death of Rosan Decker, an administrator was appointed, who took possession of the land in controversy, known as the "Rudolph Decker Quarter," in all respects the same as all other land belonging to the estate, looked after it, collected the rents, etc., pending the settlement of the estate. At or about the time of the mother's death, it was not known where Rudolph and one or more of the other brothers were, a belief prevailing that Rudolph was dead. J. G. Romine was made a party defendant, and filed a cross-bill setting up a judgment which he had obtained against Jefferson Decker, Jr., one of the heirs, claiming that the land in suit belonged to Rosan Decker, and that his debtor was one of the heirs, and that he was entitled to the payment of the balance due on his judgment from the eighth interest of this heir. Susan Grossclaude, one of the married sisters, filed an answer and cross-bill, setting up, among other things, that the land in controversy had belonged to Jefferson Decker, her father, and that, while Rudolph was permitted to enter the land in his own name, the land in fact belonged to Jefferson Decker during his lifetime, and therefore became the property of the estate. No testimony was offered in support of this answer and cross-bill. All other heirs made default. Trial was had to the district court, which resulted in a finding and decree adjudging the land to be the property of the estate of Rosan Decker, and ordering a partition of the premises. From this decree Rudolph Decker prosecutes appeal to this court.

There seems to be but a single question of fact involved in the case, namely, whether the land in controversy belonged to Rudolph or was the property of Rosan Decker, his mother, and hence that of the heirs at law, share and share alike. Appellant's contention in the trial court was

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that the deed by him to his mother for the land, though absolute in form, was in effect a mortgage; was so understood by both parties; and was given to secure money advanced by his mother to him when he left home for the west; that the debt was subsequently paid, and the deed surrendered to him and by him destroyed. The testimony of appellees is that at the time Rudolph left home his mother took possession of the land, collected the rents, and paid all taxes thereon up to the time of her death. All the children of Rosan Decker who testified as witnesses agreed substantially that the mother always referred to this land as Rudolph's. Several of them testified that she had repeatedly said that she was taking care of the land for Rudolph, and that when he came back it should be his land. She said to her tenants frequently that the land belonged to Rudolph, and that she was merely taking care of it for him. To one of her sons, who lived near Ashland, Saunders county, and who was down to see her some time prior to her death, she said that Rudolph had paid her back all the money he had ever borrowed of her, and spoke of the land as Rudolph's. When Rudolph visited his home in 1884 he sought to induce his brother at Ashland to take charge of the land and rent it for him; but this brother declined to do so, saying that he had matters enough to attend to of his own. One of the daughters testified that at the time Rudolph left home it was agreed between him and her mother that the latter should have charge of the land, should pay the taxes, and have all proceeds to be used in taking care of it and helping to support the younger children; that the mother told Rudolph she would do this, and take care of the land for him. Upon Rudolph's return in 1875, she said, in the presence of the daughter last mentioned, that she was glad he had come back home, and that now he could take care of his own land, and that she had enough things to look after without that. When Rudolph came back he assisted in putting down a well on this land, did some other work there, and also took some corn from the place for feeding purposes.

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Theodore Decker, plaintiff in the suit, did not appear at the trial, but gave his deposition, the material part of which is as follows:

Q. When did you last see your brother Rudolph?

A. I think it was in 1862 or 1863.

Q. Are you acquainted with the southeast quarter of section 30, town 12, range 11, Cass county, Nebraska, being the land entered by your brother Rudolph?

A. I am.

Q. Who occupied this land from 1857 till you left Nebraska in 1864?

A. My mother, Rosan Decker.

Q. Was it occupied or controlled by your mother?

A. Yes, occupied and used.

Q. Did your brother Rudolph have anything to do with it?

A. Yes, he owned it.

Q. When did your brother leave Nebraska,—before or after you did?

A. I can't say.

Q. Do you know whether or not he ever claimed to own the land?

A. I do. He did own it.

Rudolph swears that at the time he left home he borrowed \$300 from his mother, and gave her a deed to the land, to be held by her as a mortgage until such time as he could pay the debt; that his mother was to take care of the land for him as his tenant, and was to have all the proceeds of the farm after paying the taxes; that some years later he repaid this money to his mother, and that thereupon she gave up the deed, which he had given as a mortgage, and that he destroyed it in her presence; that during all of the time his mother had control of the premises she had control and was taking care of them for him; that he had never conveyed to her the title; and that he had always owned the land, and had always claimed it.

It is suggested that the testimony of Rudolph is inadmissible in this case, for the reason that appellees are rep-

representatives of a deceased person, and that under the statute Rudolph could not give in evidence a transaction between himself and the deceased mother. Upon this question it may be said that the greater part of Rudolph's testimony seems to have been admitted without objection. Counsel for appellees in their cross-examination went over the entire direct testimony of Rudolph, and required him to state several times over the entire transaction between himself and his mother, which consisted in his borrowing \$300 and giving his mother a deed for the place, which was intended to be a mortgage, and was to be held as such and was not to be put upon record; his repayment of the amount of money he had borrowed; the surrender to him by his mother of the deed and his destroying it. Appellees having themselves brought out this testimony from Rudolph, they are not now in a position to have the same excluded or to ask this court not to consider it. Again, it may be said, that if the testimony of Rudolph Decker is excluded, there is absolutely no competent evidence that the deed was ever executed and delivered to his mother, and appellees would be in no better position.

At the mother's death there was found in her room more than \$5,000 in gold and silver, and the patents for all of her land, and also the patent for Rudolph's land. None of these patents had ever been recorded. But the deed which Rudolph had given her was not found among her papers. This tends to support Rudolph's testimony that it was given up and destroyed. When the administrator of Rosan Decker was appointed and took possession, he assumed charge of this land, as well as the remainder of the estate, the rents collected therefrom being divided among the various heirs the same as proceeds from the estate, and the share belonging to Rudolph, with other moneys due him from the estate, was sent to him in Texas. These facts were shown by appellee for the purpose of estopping Rudolph from now claiming title to the land. His receiving the money can not be said to have such effect. There is nothing in the testimony to show that Rudolph knew what

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was being done by the administrator, or that he knew that any part of the money sent him was a part of the rent derived from his own land.

The testimony relied upon by appellees to sustain the finding of the trial court is that of the witness Romine, who testified that it was his understanding from what Rosan Decker told him that she had let Rudolph have some money and that he had deeded to her the land. The witness testified that he had no knowledge whether the instrument was intended as a mortgage or a deed, or whether Rudolph repaid the money to his mother. Concerning this testimony, it may be said, first, that, aside from what is given by way of declarations coming from Rudolph Decker, it has no probative value whatever. The witness claims his memory is poor, and does not attempt to give more than his understanding of the matter. He had seen the deed after Rudolph had left, but he could not say in what year. He said the deed had been acknowledged before some justice of the peace, but he did not remember the name of the justice, and he was unable to say whether or not the deed had been witnessed. Testimony of this character will not support a finding and judgment which deprives a party of his title to real property. All the witness said might be true, and in no way conflict with the testimony of Rudolph and other witnesses, and in no way tends to support the allegations of the petition. The witness does not pretend to testify to statements made by Rosan Decker, but merely gives his understanding derived from such statements. In so far as this testimony purports to give declarations of Rosan Decker, it is clearly inadmissible, as being hearsay. Rosan Decker herself, if living, and the plaintiff in this action, would not have been entitled to have these declarations admitted in her favor, and the rule is equally well settled that after her death such declarations are inadmissible. The rule is that declarations or admissions made by a party when in possession of real estate, and afterwards deceased, are admissible as competent evidence to show the character of his possession, but not for the pur-

pose of building up or destroying the record title. *Sutton v. Casselleggi*, 5 Mo. App., 111. In the case cited it is said: "Declarations by a party in possession are admissible to show the nature of his possession, or under what title he claims to hold, but such declarations can not be made to prove the title itself." The same rule is followed in *Dodge v. Freedman's Savings & Trust Co.*, 93 U. S., 379. In that case it is said: "Such declarations are competent only to show the character of the possession of the person making them, and by what title he holds, but not to sustain or to destroy the record title." The same doctrine is announced in *Mooring v. McBride*, 62 Tex., 309; *Osgood v. Coates*, 1 Allen [Mass.], 77; *Gilbert v. Odum*, 69 Tex., 670, 7 S. W. Rep., 510; *Morrill v. Titcomb*, 90 Mass., 100. The rule is equally well settled and established by authority that declarations of one in possession of land in disparagement of his own title are admissible against him and those claiming under him. *Osgood v. Coates*, *supra*. On the other hand, the evidence of the plaintiff in the action, to the effect that the title was in Rudolph, it being his property, as well as the testimony of the other children of the deceased mother to the same effect, and that the mother had repeatedly declared that the land belonged to Rudolph, and had always characterized the land as that of her absent son, and that she was merely taking care of it for him, is entitled to great weight, not only because in so testifying they gave evidence against their own interests, but because the declarations of the decedent were against interest, or in disparagement of title. *Potter v. Waite*, 55 Conn., 236, 10 Atl. Rep., 563; *McLeod v. Swain*, 27 Am. St. Rep., 229. Appellees' testimony is in no way inconsistent with or contradictory of the evidence of Rudolph that he owned the land in controversy. All the evidence offered by appellees may be admitted to be true, and yet in no way tend to establish that the land in controversy was the land of Rosan Decker. The evidence of Rudolph alone, even if it had not been corroborated, would be sufficient to establish his title to the land; for the undisputed reasonable testi-

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mony of one witness, though a party to the action, is entitled to controlling weight in determining a question of fact. *Burnham v. Norton*, 100 Wis., 8. It follows that the judgment of the trial court is not sustained by sufficient competent evidence. The testimony of Rudolph Decker is clear and convincing that at the time he gave the deed to his mother, it was simply as a mortgage securing a loan, that he had paid the debt, and that the instrument was given up and he destroyed it. This is strongly corroborated by the testimony of the other heirs. This being true, Rosan Decker never had the title, and whatever right she had as mortgagee was divested by the payment of the debt and the surrender and destruction of the deed. *Schade v. Bessinger*, 3 Nebr., 140; *Commonwealth v. Dudley*, 10 Mass., 402; *Farrar v. Farrar*, 4 N. H., 191; *Mussey v. Holt*, 24 N. H., 248, 252. The testimony of Rudolph also shows, and this is corroborated by that of the other heirs, that his mother had possession for him. This being true, the heirs could acquire no right under claim that her possession was adverse. *Johnson v. Butt*, 46 Nebr., 220; *O'Boyle v. McHugh*, 69 N. W. Rep. [Minn.], 37.

It is contended by counsel for appellees that appellant should not have been permitted to introduce any evidence to show that the instrument he gave was in fact a mortgage under an answer which in effect amounted to a denial. The cause was tried upon an amended reply filed and relied on by appellee, a portion of which is as follows: "Further replying to said answer the plaintiff alleges that the deed for the premises in controversy made and executed by defendant Rudolph Decker to the said Rosan Decker, was absolute, and was delivered to her by the said defendant without any conditions whatever attached thereto." This reply squarely puts in issue the question which was really tried, namely, whether the conveyance made by Rudolph was in fact a deed or a mortgage. This is sufficient to dispose of the question suggested by appellees, even if it had other and further merit.

In this case the evidence discloses that Rudolph Decker

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pre-empted the land, paid the government price and that the patent therefor was issued to him by the government. His title seems to have been perfect. It is certain that no consideration has ever been paid to him at any time for parting with the title. He was directed by his father, while on his death-bed, to remain with his mother, and work for her support, and to assist her in caring for and rearing the smaller children. This he seems to have done, remaining with his mother and working for her after his father's death for a period of seven years, and when he did leave gave into his mother's possession his land, exacting only, as rent therefor, the payment by her of the taxes. She kept this land with her estate and reaped the benefits from it for twenty-five years. It is inequitable and unjust to deprive him of the title to his land without consideration upon evidence so slight and unsatisfactory as that found in the record. The finding and judgment of the trial court clearly appear to be wrong, and should be reversed and set aside, and a decree entered in this court dismissing the petition of appellee Theodore F. Decker, and the cross-petition of J. G. Romine and Susan Gross-claude, and quieting the title of appellant Rudolph Decker to the premises in controversy.

HASTINGS and DAY, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and decree entered here dismissing the petition and cross-petitions of appellees and quieting title in Rudolph Decker.

JUDGMENT ACCORDINGLY.

KATE BLUMER, APPELLEE, v. EDWIN ALBRIGHT ET AL., APPELLANTS, ET AL., APPELLEES.

FILED MARCH 19, 1902. No. 10,640.

Commissioner's opinion, Department No. 1.

1. **Homestead: ABANDONMENT.** A departure from the homestead for the purposes of business, pleasure or health, does not constitute an abandonment thereof, unless coupled with such departure is the intention not to return; and the wife can not be deprived of her homestead right unless she participated in the intention not to return.
2. ———: **CONVEYANCE: ACKNOWLEDGMENT.** Under the laws of this state, the acknowledgment of the wife to a deed conveying the homestead is essential to its validity.
3. **Evidence.** Evidence examined, and held to sustain the findings of the trial court that the premises in controversy were the homestead of appellee, and that she did not voluntarily execute the deed of conveyance.

APPEAL from the district court for Dodge county. Heard below before ALBERT, J. *Affirmed.*

Brome & Burnett and A. G. Ellick, for appellants.

Frank Dolezal, contra.

KIRKPATRICK, C.

This is a suit brought in the district court for Dodge county by Kate Blumer against Edwin Albright and Lizzie Albright, his wife, and E. F. Blumer, husband of plaintiff, for the purpose of procuring the cancelation of a deed of conveyance alleged to have been executed by Kate Blumer and her husband to Edwin Albright, defendant, upon certain lots in the village of Scribner, in Dodge county. Plaintiff alleged in her petition that she was a married woman, that her husband, E. F. Blumer, was made a defendant in the action because he refused to join with her as plaintiff; that they are the owners of lots 1 and 2 in block 5 in the village of Scribner, county of Dodge, and

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that the same constitute the homestead of herself and husband; that they have two children; and that on or about the 28th day of December, 1897, the defendant Edwin Albright procured the deed in controversy from her by duress and fraud; and that the description of the property in the deed was so fatally defective that it was ineffectual to convey the title. Edwin Albright, appellant herein, filed an answer, which was in effect a general denial. Trial was had, which resulted in a finding and judgment for Kate Blumer, canceling the deed of conveyance, and quieting the title to the premises in her and her husband. From this judgment defendant Albright prosecutes appeal to this court.

Appellant contends, first, that the property in question is not the homestead of appellee and of her husband; second, that the description of the property in the deed is sufficient; and third, that the execution of the deed by appellee was not obtained by fraud or duress. In the view we take of the case, it will only be necessary to consider the first and third contentions of appellant.

It is disclosed by the record that appellee and her husband, with their two children, resided in their home on the lots in question for a number of years prior to 1890 or 1891; that about that time appellant Albright, who was a brother-in-law of appellee's husband, E. F. Blumer, induced the latter to remove to the town of Beemer and go into partnership with him in the grain, coal and live-stock business. About the time this arrangement was entered into, appellee, with her husband and children, removed to Beemer, and resided in that village up to the time of the trial, some six or eight years. While there they occupied a house, the property of the partnership of Blumer & Albright, the rent for which was charged against Blumer on the firm books. The testimony is undisputed that during all this time appellee claimed the property in Scribner, which they rented to other parties, as her homestead. She refused to sell it on that account, and always expressed the expectation of going back to it to live; that she did not

expect to remain in Beemer more than five years. There can be no doubt from the evidence that appellee always regarded this property as her homestead, and at no time entertained an intention of abandoning it as such. The rule is well settled in this state that removing from the homestead and residing elsewhere for the purposes of business, health or pleasure, does not work an abandonment of the homestead unless coupled with such removal is the intention not to return. *Dennis v. Omaha Nat. Bank*, 19 Nebr., 675; *Edwards v. Reid*, 39 Nebr., 645; *Quigley v. McEvony*, 41 Nebr., 73, 85; *Mallard v. First Nat. Bank*, 40 Nebr., 784, 789.

It is contended with much earnestness and ability by counsel for appellant that the husband, being the head of the family, has the right to determine and control the domicile of the family, if he acts in good faith and not fraudulently; that by removing from the homestead, and taking up his abode elsewhere, he can divest both himself and his wife of their homestead right; especially is this true, it is contended, where the wife and family accompany the husband to the new abode. Many cases from other states than our own are cited in support of this doctrine. We are unable to adopt this view. It seems very clear from an examination of the provisions of our statute relating to homesteads that the purpose of the legislature was to secure a home, not for the benefit of the husband alone, or of the wife, but for the family as an entirety; and it is accordingly provided that no conveyance of the homestead can be made except by a deed in the execution of which both husband and wife have freely and voluntarily joined. Thus the husband is wholly deprived of his power of alienation unless with the free consent of his wife. To sustain the contention of appellant would result in permitting a dissolute and worthless husband, whose sense of responsibility for the preservation of the family had been blunted by vice and dissipation, to deprive his wife and family of the benefits of the homestead law by simply abandoning it and taking his family with him elsewhere, without regard

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to the wife's wishes, rights or intentions; the husband thus being empowered to accomplish by indirection what the legislature has sought, by express provision, to prevent him from doing directly. It is not an uncommon thing that the wife, particularly in matters affecting the conservation of the home and the protection of offspring, is more prudent, alert and circumspect, and even tactful, than the husband. In view of the rule that after departure from the homestead, the burden is upon those claiming homestead rights to show that the departure was not coupled with the intention not to return (*Conway v. Nichols*, 76 N. W. Rep. [Ia.], 681; *Newman v. Franklin*, 28 N. W. Rep. [Ia.], 579), it is not difficult to conceive how the most grievous injustice might result in confining the inquiry as to intention wholly to the conduct and statements of the husband during the time the family lived elsewhere. The injustice of such a rule could not be better illustrated than in the case at bar. Ed Blumer, the dissipated husband, had grown careless and negligent in his marital obligations, and it is not unlikely that, if he at one time shared in the intention to return to the homestead at Scribner, he had lost all interest in that aspiration; while the wife, on the other hand, would naturally have had her intention in that respect strengthened, and would frequently have expressed that intention to her associates, as it amply appears from the record she did. The better rule, and one more in harmony with our statute and decisions, would seem to be as stated in *Waples, Homestead & Exemption*, page 582, that the wife "does not abandon her right by doing her conjugal duty in following her husband to another residence. The wife can not be compelled to elect between her husband and her homestead." We have no doubt that under the laws of this state, departure from the homestead can not be construed into an abandonment thereof, unless the intention not to return is shared in by both husband and wife. The testimony in this case clearly shows that the wife never intended to abandon the homestead, and therefore the finding of the trial court that the

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property in controversy was the homestead of appellee and her husband is right.

The next question requiring consideration is whether the execution of the deed in question by the wife was procured by fraud and duress. The testimony shows that for some two or three years before the date of the signing of the deed the husband of appellee, E. F. Blumer, was for a considerable portion of his time in a state of intoxication; that on the day the deed was executed he was drunk, and came to the house in that condition, asking appellee whether she was ready to sign away her home, saying that he had been threatened with the penitentiary, to which she replied that she would not sign away her home, that it was the last thing they had, and that she would not give her consent to its going. Later in the day he returned, still intoxicated, in company with appellant Albright, his brother-in-law and partner, to whom the deed for the homestead was made, the attempted transfer appearing to have been undertaken in settlement of an indebtedness from Blumer to him growing out of the dissolution of the partnership. It seems that appellee and her two daughters were greatly excited, and were crying in consequence of the brutal conduct of the husband. The appellant Albright advanced toward appellee with clenched fist, saying, "Sign it, Kate, sign it, or you will sign it for the sheriff to-morrow," or words to that effect. Appellee asked Albright for what purpose she was asked to sign away her home, to which he replied that it was his business. The undisputed testimony discloses that the husband abused and scolded his wife, and that after he and appellant had been there for some time, the wife was finally brought to sign the deed, declaring, however, that she would never acknowledge it. In the evening the husband came with a justice of the peace to take the acknowledgment. They found appellee much excited, and still weeping, and when the justice of the peace asked her if she acknowledged the deed to be her voluntary act and deed, she promptly told him that she did not, and that she never would. It seems that two deeds

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had been signed, one covering some lots in the village of Beemer, and appellee said that with reference to these she did not care, but that she never would acknowledge the execution of the deed covering her homestead to be her voluntary act. The justice thereupon said that under such circumstances he could not take the acknowledgment. He then informed her that he had been told that the latter deed was only temporary, and that her husband had the papers to show for it. She asked to see these papers, but the husband did not have them. She repeatedly stated to the justice that she would not acknowledge the deed to be her voluntary act, that she had been forced to sign it by being threatened with the sheriff; but she finally told him that he could go ahead and take the acknowledgment, still persisting that it was not her voluntary act. Under the statutes of this state the conveyance of a homestead without the acknowledgment of the wife is absolutely void. Compiled Statutes, ch. 36, sec. 4; *Horbach v. Tyrrell*, 48 Nebr., 514. And whether, under the facts in this case, the wife's acknowledgment is such as contemplated by the statute, even if it should be conceded that there was not duress within the legal signification of the term, may well be doubted. But we do not put the determination of the question upon that ground. It may be true that under the strict rule of the common law the acts complained of would not be sufficient to constitute duress; but it is very clear that the statement made by the husband of appellee that he would be sent to the penitentiary if she did not sign, his coercion in the way of abuse while in an intoxicated condition, and the physical demonstrations by appellant Albright, and the violent words used by him, had such an effect upon her mind that the act of signing was not one of her own free volition; that is, was not her act. No equities of any description existed in favor of appellant Albright. The appellee, at the time of the formation of the partnership, objected to it, and stated to Albright that she would not permit her homestead at Scribner to go into the business; that she was going to keep that; and that while

she might go to Beemer for a time, she would return again and occupy her home at Scribner. Not a dollar of consideration was paid her for the conveyance. Her husband, to whom she had a right to look for protection and counsel, had apparently turned against her, and while intoxicated, threatened and scolded her, till she was induced to sign the deed purporting to convey her homestead. This was sufficient to constitute duress and undue influence. It is impossible to read this record without reaching the conclusion that the signature and acknowledgment of appellee were extorted from her by coercion and duress exercised by her husband and appellant. Neither the statutes nor the courts of this state permit the homestead right to be taken this way. The trial court found that the conveyance was not the voluntary conveyance of the wife, and such finding seems to have abundant support in the testimony. In the case of *Munson v. Carter*, 19 Nebr., 293, this court said: "Where coercion is not sufficient to amount to duress, but a social or domestic force is exerted on a party which controls the free action of his will, and prevents voluntary action in the making of a contract or execution of deed for real estate, equity may relieve against the same on the ground of undue influence." Again this court, in the case of *Hargreaves v. Korcek*, 44 Nebr., 660, said: "The rule as to duress *per minas* has now a broader application than formerly. It is founded on the principle that a contract rests on the free and voluntary action of the minds of the parties meeting in an agreement which is to be binding upon them. If an influence is exerted on one of them of such a kind as to overcome his will, and compel a formal assent to an undertaking when he does not really agree to it and make that appear to be his act, which is not his, but another's, imposed on him through fear which deprives him of self-control, there is no contract." Upon the question of duress by threats of imprisonment, it is said in the same opinion: "One who has overcome the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which

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were made for another purpose, and he is in no position to claim the advantage of a formal contract obtained in that way. * * * In such a case, there is no reason why one should be bound by a contract obtained by force, which in reality is not his but another's."

It seems very clear from the evidence in this case that the property in controversy is the homestead of appellee, and that she never voluntarily conveyed it. The findings and judgment of the trial court are right, and it is therefore recommended that the same be affirmed.

HASTINGS and DAY, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the findings and judgment of the trial court are

AFFIRMED.

GEORGE ALLEN ET AL. V. JOHN H. HALL.*

FILED MARCH 19, 1902. No. 11,248.

Commissioner's opinion, Department No. 2.

1. **Real Estate Agent: ORAL AGREEMENT: STATUTE OF FRAUDS.** A verbal contract with an agent or broker to sell land for the owner thereof, is void under the statute of frauds, and it requires the voluntary act of both parties thereto to completely execute it, so to take it out of the operation of the statute.
2. **Tenant: LANDLORD'S TITLE.** A tenant who leases land, enters into the possession thereof, cultivates it, raises the crops thereon, converts them to his own use, and is not disturbed in his possession by any one claiming by paramount title, can not plead want of title in his landlord as a defense to an action for the rent.
3. **Instructions: ERROR WITHOUT PREJUDICE.** The giving of an instruction which is fairly within the issues raised by the pleadings and the evidence produced on the trial, and which the record shows did not mislead the jury, though not technically correct, is error without prejudice.
4. **Evidence: STATEMENT BY PARTY: HEARSAY.** Statements made by

*Rehearing allowed. Judgment below reversed.

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a party to a suit, to a third person, may be received in evidence against him, and are not open to the objection that they are hearsay evidence.

ERROR from the district court for Scott's Bluff county.
Tried below before GRIMES, J. *Affirmed.*

T. M. Morrow, for plaintiffs in error.

F. A. Wright, *contra.*

BARNES, C.

This action was commenced by the defendant in error, who will hereafter be called "defendant," in the district court for Scott's Bluff county to recover the sum of \$107.20, alleged to be the rental value of certain land leased by the defendant to the plaintiffs in error during the year 1897. The plaintiffs, in their answer, attempted to plead three defenses, as follows: First, they admitted that they rented and cultivated the land described in defendant's petition, but alleged that they only agreed to pay whatever they thought proper; that the land was wild and uncultivated; that it took an extra amount of labor to cultivate it and raise the crops thereon; and that therefore there was nothing due to the defendant; second, that subsequent to the time they leased the premises they entered into a verbal agreement with defendant that if they would procure a purchaser for the land at a stipulated price the defendant would give them any interest he might have in the crop; that they did procure a purchaser, who bought the land at the price mentioned, and that thereupon all the interest defendant had in the crop vested in them, and that they appropriated the same to their own use under said agreement, and that defendant was thereby estopped from asserting any ownership thereto; third, that while the crops were growing on the land defendant sold and conveyed it by warranty deed to another, and thereby conveyed away all his right, title and interest in said crop, if he ever had any, to said third person, and that he had

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no interest therein at the time of bringing his action. The reply to this answer was a general denial. The case was tried, and the jury returned a verdict for the defendant herein for the sum of \$40. A motion for a new trial was overruled, judgment was entered on the verdict, and the plaintiffs in error bring the case to this court for review.

1. They contend that the court erred in striking out and rejecting all of the evidence in relation to the second defense, to wit, the defense of their verbal contract to act as agents or brokers to procure a purchaser for the land, and have, as compensation therefor, all of the defendant's interest in the crop. The record shows that the court heard all of the evidence on this question, and afterwards struck the same out and refused to submit that question to the jury. At the time the alleged verbal contract was entered into section 74 of chapter 73 of the Compiled Statutes was in force. That section is as follows: "Every contract for the sale of lands, between the owner thereof, and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent." Plaintiffs in error in their argument admit the force of this statute, and concede that, if the contract was not fully executed at the time the action was commenced, they could not recover thereon. They contend, however, that the contract was (to use their language) fully executed, because they had possession of the defendant's portion of the crop; that, having such possession, it was not necessary for the defendant to deliver it to them, and therefore they paid themselves, though contrary to the defendant's wishes, and the contract became fully executed. The fallacy of this position is that the plaintiff's possession of the defendant's rental share of the crop did not arise under, or grow out of, this void contract. It arose upon, and was incident to, the valid contract for the leasing of the land. It would be a travesty

to say that plaintiffs could keep the defendant's share of the crop against his will, and by reason of such forcible and wrongful action, so taken without his consent and against his protest, compel him to execute the void contract, and then say to him, "You have executed the contract which you repudiated as void, and therefore can not recover the rental value of the land." The complete execution of a contract necessary to take it out of the statute of frauds must be the voluntary act of both parties thereto. Again, the evidence was hardly sufficient to sustain this verbal contract, and for these reasons we hold that the court did not err in striking the evidence out of the record and refusing to submit this question to the jury.

2. It is contended that the court erred in sustaining the objections to the introduction of the deed, by which defendant conveyed the land to one Effert, and in thus depriving the plaintiffs of their third defense. They admit that they leased the land of the defendant, who was the owner of it at that time; that they cultivated it, raised the crops thereon, harvested them and converted them to their own use. They do not plead eviction by any one, or that they were disturbed in their leasehold estate, or that they were compelled to attorn to any one with a paramount title. Under these facts their answer did not state a defense, and they are strictly within the rule of *Nissen v. Turner*, 50 Nebr., 272, and *Mosher v. Cole*, 50 Nebr., 636, which held that where the lessee held the land under his lease, and had not been disturbed in his possession, and that there had been no eviction by paramount title, he could not plead want of title in his landlord as a defense to the payment of the rent. The court did not err in excluding this evidence.

3. It is contended that the court erred in giving the fourth paragraph of his instructions to the jury. We have examined the record in connection with this instruction, and, while it may not have been accurately and carefully worded, it was fairly within the pleadings and the evidence, and did not have any tendency to mislead the jury.

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They certainly were not misled by it, for the verdict was for only \$40, when it might have been for \$107.20, and not excessive. The giving of this instruction, if error at all, was error without prejudice.

4. The errors complained of in the admission of evidence having been carefully examined by us, we find that it is contended that the court erred in receiving the evidence of the witness Lee, because it is claimed that he got his information second hand, and that his testimony was hearsay evidence. It is a sufficient answer to this objection to say that the evidence complained of was the statements made by the plaintiffs themselves to the witness, in relation to the kind and amount of crops raised upon the land in question. The statements of a party, against his own interests, are always admissible in evidence against him.

A careful reading of the bill of exceptions shows that there was no substantial error in receiving or rejecting evidence. The judgment in this case is right, and we recommend that it be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

ESTATE OF JOHN FITZGERALD, DECEASED, V. FIRST NATIONAL
BANK OF CHARITON, IOWA.

FILED MARCH 19, 1902. No. 10,783.

Commissioner's opinion, Department No. 2.

1. **County Court: CLAIM: JURISDICTION: LIMITATION.** The county court has no jurisdiction over a claim against the estate of a decedent which is not filed for allowance until after it has been finally barred by the statute of non-claims.
2. ———: ———: ———: ———: **EXTENSION OF TIME FOR FILING CLAIM.** When the county court fixes a time for the presentation of claims against an estate and enters an order barring

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all claims not then presented, as provided by section 217, chapter 23, Compiled Statutes, such time may be extended on application of a belated claimant, provided such application is for good cause, and is made within six months of the time first fixed and within two years of the appointment of the commissioners.

3. ———: ———: ———: ———: ———: **ERROR: DISTRICT COURT: APPEAL.** Where a claim against a decedent's estate is not presented before the time first fixed for the presentation of claims, its allowance afterwards, unless upon special proceedings to revive the commission and to extend the time for the presentation of claims, is error, whether in the county court or on appeal to the district court.
4. **Administrator: WAIVER.** An administrator can not waive the defense of non-claim to the prejudice of his estate, either by agreement with the claimant or by neglecting to plead such defense.

ERROR from the district court for Lancaster county. Tried below before HALL, J. *Reversed.* SEDGWICK, J., dissenting.

James Manahan, for plaintiff in error.

Charles L. Burr and *Lionel C. Burr*, *contra*.

OLDHAM, C.

This action originated on a claim in the nature of a promissory note, due on demand, for \$5,000 and interest, filed in the probate court of Lancaster county, Nebraska, by the plaintiff below against the estate of John Fitzgerald, deceased. The facts appearing from the record necessary for a determination of this cause are: That John Fitzgerald, intestate, died December 30, 1894. On March 14, 1895, Mary Fitzgerald was duly appointed and qualified as administratrix of his estate. On the same day the county court made and entered an order limiting the time in which creditors might present claims against the said estate to six months, and naming June 29, 1895, and September 30, 1895, for examining such claims as might be presented. On September 30, 1895, the county court made

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and entered an order forever barring all claims not then presented against said estate, and this order was not appealed from and has never been vacated, changed or modified. On May 22, 1896, the plaintiff in the court below presented to the county court and filed the claim in dispute against the estate of John Fitzgerald, deceased. On the same day the administratrix indorsed in writing on said claim her motion to have the same stricken from the files on the ground that it was not presented within the time limited by order of the court for presenting claims against said estate. This motion was overruled and on June 19, 1896, the county court ordered the administratrix to file an answer to said claim. On August 24, 1896, the administratrix, in obedience to the order of the court, filed the following answer:

“CLAIM OF THE FIRST NATIONAL BANK OF CHARITON, IOWA, V. THE ESTATE OF JOHN FITZGERALD, DECEASED, MARY FITZGERALD, ADMINISTRATRIX OF SAID ES- TATE.	}
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“Comes now Mary Fitzgerald, as administratrix of the estate of John Fitzgerald, deceased, and for answer to the claim filed herein by the First National Bank of Chariton, Iowa, says: that save and except as hereinafter expressly admitted, she denies each and every allegation made by the said claimant in its complaint and each and every part thereof; she admits that John Fitzgerald, died on the 30th day of December, 1894, and that she is now the duly qualified and acting administratrix of his estate; and she admits further that in May, 1896, Charles Burr, Esq., one of the claimants attorneys presented to her a paper saying it was a note of John Fitzgerald held by the First National Bank of Chariton, Iowa, and that she then and there refused to recognize it as such. Further answering said claim said administratrix states that the

estate of John Fitzgerald is not in any manner indebted to the said claimant and asks that the said claim be disallowed.

MARY FITZGERALD,

"Administratrix of the Estate of John Fitzgerald.

"By JAMES MANAHAN, her Attorney."

On a hearing subsequently had on said claim, on March 11, 1897, the claim was allowed and the cause was appealed by the administratrix to the district court of Lancaster county, Nebraska. No order was made by the district court directing an issue to be made between the parties in that court, and the hearing was had on the transcript and pleadings which had been certified from the probate court to the district court. Counsel for plaintiff in error objected to the introduction of the claim in suit for the reason that it had not been presented against the defendant in the county court within the time limited by that court for the presentation of claims against that estate; and for the reason that it had not been presented until long after a judgment of the county court had been rendered forever barring all claims not then presented against said estate; and for the further reason that this claim was not filed in the county court for more than six months after the county court had entered its order forever barring all claims not then filed. These objections were overruled by the district court. The claim was admitted in evidence. Plaintiff had judgment in the court below and defendant brings error to this court.

There are numerous errors alleged against the proceedings in the trial of this cause in the district court in the brief of the plaintiff in error, but in view of the conclusion which we shall reach with reference to the action of the trial court in overruling the objections to the introduction of the claim, it will not be necessary to consider any of the other alleged errors. The trial court overruled the objections of the administratrix to the introduction of the claim on the ground that it was an issue which was not tendered by her answer in the county court. It is the general rule of practice that, when a cause is appealed

from the judgment of the county court or a justice of the peace, the cause must be tried on the issues tendered in the court below, unless the issue tendered above is one which challenges the jurisdiction of the subject-matter of the controversy. The questions then arise: Is a plea of the statute of non-claims one that can be waived by the administrator of an estate? and is it an issue that goes to the jurisdiction of the county court over the subject-matter of the claim? These questions have never been specifically determined by a judgment of this court. The case of *Stichter v. Cox*, 52 Nebr., 532, determined some questions bearing strongly on the point at issue. In that case a claim was presented to the county court after its bar by the statute of non-claims. No pleadings were filed in the county court, but the administrator objected to the claim because of the bar of the statute. The cause was appealed to the district court, and that court directed an issue to be made between the parties. The administrator answered, and tendered the issue of the statute of non-claims. No motion was made to strike this defense from the answer. On error proceedings in this court the claimant sought to raise the question that the statute of non-claims had not been pleaded in the county court. In discussing this question NORVAL, C. J., said: "More than one answer can be properly made to this contention. There is no provision of statute requiring the administrator to plead in the county court to a claim presented therein against his intestate, except section 221, chapter 23, Compiled Statutes, makes it his duty to exhibit any claim of the decedent in offset to that of the creditor. In this case, however, the administrator did file in the county court formal objections to the allowance of this claim, and in the district court, in his answer, he specially pleaded the statute of limitations. The claimant did not move to strike this defense from the answer, nor did he in any other manner present the question to the trial court that the issues raised by the answer were different from those in the county court, obtain a ruling thereon, and preserve an exception thereto

in the record. This was indispensable to make available here the objection that there was a variance in the issues. *Robertson v. Buffalo County Nat. Bank*, 40 Nebr., 239." While the decision in this case turned on the question of the failure of the claimant to object to the answer filed by the administrator in the district court, yet it says that "more than one answer can be properly made to this contention," and it also says that the administrator was not required to file any answer in the probate court, and by inference it says that his objection to the claim in the county court was sufficient to raise the issue of the statute of non-claims.

Turning now to the sections of the statute providing for the payment of debts and legacies of deceased persons, and particularly to those sections that provide for the presentation and allowance of matured and absolute claims, to which class the claim in suit belongs, we find that sections 217-219, chapter 23, Compiled Statutes of 1901, provide as follows:

"Sec. 217. The probate court shall allow such time as the circumstances of the case shall require for the creditors to present their claims to the commissioners for examination and allowance, which time shall not, in the first instance, exceed eighteen months, nor be less than six months, and the time allowed shall be stated in the commission.

"Sec. 218. The probate court may extend the time allowed to creditors to present their claims, as the circumstances of the case may require; but not so that the whole time shall exceed two years from the time of appointing such commissioners.

"Sec. 219. On the application of a creditor who has failed to present his claim, if made within six months from the time previously limited, the court may, for good cause shown, renew the commission, and allow further time, not exceeding three months, for the commissioners to examine such claims, in which case the commissioners shall personally notify the parties of the time and place of hearing,

and, as soon as may be, make return of their doings to the probate court."

These sections are followed by sections 221 and 226, which provide as follows:

"Sec. 221. When a creditor against whom the deceased has had claims shall present a claim to the commissioners, the executor or administrator shall exhibit the claim of the deceased in off-set to the claims of the creditor, and the commissioners shall ascertain and allow the balance against or in favor of the estate, as they shall find the same to be, but no claim barred by the statute of limitation shall be allowed by the commissioners in favor of or against the estate as a set-off or otherwise."

This section prohibits the commissioners or the county judge from allowing any claim that is barred by the statute of limitation.

"Sec. 226. Every person having a claim against a deceased person whether due or to grow due, whether absolute or contingent, who shall not, after giving of notice as required in section 214 of this chapter, exhibit his said claim or demand to the judge or commissioners, within the time limited by the court for that purpose, shall be forever barred from recovering on such claim or demand or from setting off the same in any action whatever," etc.

An examination of the sections of the statute above quoted reveals the fact that, after claims against an estate have been barred by the order of the county court at the time first fixed, it is still left within the power of the county court, by section 218, *supra*, to extend the time to present claims against the estate to a time not to exceed two years from the appointment of the commissioners. This section of the statute plainly contemplates a general order made by the county judge, in his sound discretion, to apply alike to all claimants who have failed to present their claims at the time first fixed. This section is followed by section 219, *supra*, which provides the manner in which a single claimant may secure a special order for the extension of the time of the presentation of his particular

claim, and the provision is that this order may be made "on the application of a creditor who has failed to present his claim, if made within six months from the time previously limited," etc.

Now, in the case at bar, it clearly appears from the record that no application has ever been made to the county court to extend the time first allowed by that court for presenting claims; and even if we should construe the mere filing of the claim into an application for an extension of time for presenting claims, which we can not do, it yet clearly appears that the claim was not presented until nearly eight months after the time first fixed for the final presentation of claims. In the case of *Sleeper v. Estate of Gould*, 53 Vt., 111, it was held that, to give any effectiveness whatever to the plain reading of a statute similar to our own, the application for an extension of time must be made within six months of the time first fixed. In the case of *McGee v. Atkinson*, 33 N. W. Rep. [Mich.], 737, it is held that the probate court would have no jurisdiction of a claim presented after the time fixed for presenting claims, where no proceedings had been taken to have the time of presentation extended. In discussing the question of the defense of non-claim, Rice, in his work on American Probate Law (sec. 8, p. 358), says: "The principle referred to is, in practical effect, a statute of limitation, having at the same time no affinities with the general statutes of limitation. According to these enactments, claimants who neglect to exhibit their demands against the estate within a set period mentioned, are forever barred, and courts should, of their own motion, insist upon this defense where it is apparent the administrator has neglected it."

In the settlement of an estate an administrator is merely the agent and trustee of the decedent and possesses only such powers as are given him by statute, and he must discharge his trust subject to all limitations prescribed by statute. It is uniformly held that an administrator has no authority to waive the statute of non-claim, either by failing to plead it or by consenting to the filing of a claim

after its bar; and the same rule applies with reference to the general statute of limitations in all states which, like our own, prohibit the allowance of claims barred by such statutes. *O'Keefe v. Foster*, 5 Wyo., 343, 40 Pac. Rep., 527; *Voorman v. Li Po Tai*, 45 Pac. Rep. [Cal.], 470; *Rockport v. Walden*, 54 N. H., 167, 20 Am. Rep., 131; *Ames v. Jackson*, 115 Mass., 508; *Collamore v. Wilder*, 19 Kan., 67; *Miner v. Aylesworth*, 18 Fed. Rep., 199; *Bush v. Adams*, 22 Fla., 177. We are aware of the fact that the conclusions which we are about to reach appear to be somewhat at variance with the doctrine announced by the supreme court of Wisconsin in the case of *Tredway v. Allen*, 20 Wis., 500, in the construction of a statute substantially the same as our own. The issues in that case arose on a claim that was presented for allowance more than six months after the time first fixed, and less than two years from the time of the appointment of the commissioners, but it differs from the facts in issue in the case at bar in that an application was made to the probate court for an extension of time, and that this application was granted over the objection of the administrator, before the claim was filed. No appeal appears to have been taken from the order of the probate court allowing the claim, but an appeal was taken from the order of distribution made by the probate judge directing the payment of the claim. On the appeal from this order of distribution the supreme court found against the administrator, and in rendering the opinion said: "We are inclined to hold that this was merely an irregular or erroneous exercise of power on the part of the county court, and did not go to the question of jurisdiction. For, as already observed, when the respondent made his application to have his claim allowed, the county court, under section 6, has an undoubted right to extend the time for all creditors of the estate to come in and present their claims. The two years did not expire until the 29th of September, 1862. But, although the court assumed to proceed under section 7, and only extended the time as to the respondent, yet, at

most, we think this was but error. Such being the case, that part of the order of distribution appealed from must be affirmed." While our statute, as above stated, is substantially the same as the statute construed in the cause just cited, it is also a substantial copy of the statute of the state of Vermont, and the construction that we are inclined to give this statute seems to be fairly sustained by the supreme court of the state of Vermont in the case of *Sleeper v. Estate of Gould, supra*, and also to be sustained strongly by the supreme court of Michigan in the case of *McGee v. Atkinson, supra*. Again, we notice that the supreme court of Wisconsin, in the later case of *Carpenter v. Murphy*, 15 N. W. Rep., 800, refers with approval to the construction of these statutes by the supreme court of Vermont. It is an elementary rule of statutory construction that, if possible, a statute should be so construed as to give full force and effect to each and all of its provisions. The construction we favor gives full force and effect to all the provisions of both sections 218 and 219, *supra*, and is in full harmony with this rule, while the construction of the statute which is intimated in *Tredway v. Allen, supra*, practically nullifies the provisions of section 219. Even if *Tredway v. Allen, supra*, contained a proper construction of the statute, and the action of the county court in allowing the claim to be filed was erroneous, and not void, as that case holds, we still think the defense of non-claim should have been permitted by the district court, because if this defense existed the administratrix had no right to waive it.

It is therefore recommended that the judgment of the district court be reversed and the cause remanded.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

POUND, C., dissenting.

I am unable to agree in the conclusions reached in the opinion of my Brother OLDHAM. To my mind the con-

struction given to the sections of the statute quoted is required neither by the terms of the statute itself nor by the authorities cited. Section 214, chapter 23, Compiled Statutes, provides that ordinarily claims against an estate shall be presented to and ruled upon by the county judge, but that if the parties interested, or one of them, so demand, commissioners are to be appointed to examine and pass on such claims. Thus there are two methods of examining claims,—one by the court itself and one by commissioners appointed for that purpose; and this fact must be borne in mind in arriving at the meaning of the subsequent sections. Section 217 fixes the time to be appointed in the first instance for the presentation of claims. Section 218 confers upon the county court a general power to extend the time allowed for presentation of claims, as the circumstances of the case may require, subject to the limitation that the whole time shall not exceed two years. Section 219 provides for applications to renew the commission and allow further time for the commissioners to consider claims, and limits applications for such renewal to six months from the time originally limited. Section 220 permits the county judge to pass on claims in such cases in person, instead of renewing the commission. The question comes to this: Is section 219 a limitation upon section 218, so that no action may be had by the court under the former unless application is made therefor within the time limited by the latter, or are they independent, and do they refer to distinct proceedings intended to be governed by different rules? I am constrained to the latter conclusion both by the language of the sections themselves and by the context. The one refers in terms to a general extension of the time within which claims may be filed, and limits the period of such extension to two years from the time when claims were originally allowed to be presented. The other refers in terms to the renewal of the commission provided for in the latter part of section 214, and contains different limitations, namely, that application for such renewal must be made within six months from the time orig-

inally limited, and that the time allowed shall not exceed three months. Under such circumstances, the proper construction, in my view, is that section 218, and not section 219, applies where there is no commission, and that the court has power to extend the time for filing claims at any time, "as the circumstances of the case may require," subject to the limitation of time of section 218, at least where no commission has been demanded or appointed. I am unable to see that the cases of *Sleeper v. Estate of Gould*, 53 Vt., 111, and *McGee v. McDonald's Estate*,* 66 Mich., 628, 33 N. W. Rep., 737, militate against this view. In *Sleeper v. Estate of Gould*, commissioners had been named and had reported. Application was made to renew the commission more than six months after the time originally limited. The court had before it only the section corresponding to our section 219, and said, very properly, that the "unmistakable language of the statute" required an application for renewal of the commission to be within the six months. The language quoted by my Brother OLDHAM is used with reference to a contention of counsel bearing upon that section alone, and does not refer to any questions upon the construction of such a section as our section 218. *McGee v. McDonald's Estate* was also a case where commissioners had been appointed, and a claimant who had not presented his claim to them sought to have his claim allowed by the court after they had reported, without proceeding to obtain a renewal of the commission. It is obvious that, if such a course were permitted, the provisions giving any one interested the right to have commissioners appointed could be evaded by mere inaction till after report. Such an evasion could not be tolerated. The right course, where a commission has been demanded and appointed, is to apply for a renewal thereof. Thereupon the court may in its discretion renew the commission or itself pass upon the claim. But in the case at bar there is nothing to show that there was any commission. Hence

*This case appears in 66 Mich. by the title cited in the text, and in 33 N. W. Rep. by the title cited on page 267.—REPORTER.

the provisions of section 219 as to the time within which application to renew a commission shall be made were inapplicable. The case is one falling under section 218, and only the limitation therein provided is to be considered. This position has the support of *Tredway v. Allen*, 20 Wis., *476. The statute there passed upon is substantially the same as our own, and sections 6 and 7 thereof correspond to our sections 218 and 219. The court held that where application was made more than the six months after the period originally fixed, which was the limitation in section 7, the probate judge might extend the time under section 6, not exceeding the limitation therein provided. If this construction is correct, the error of the county court in the case at bar in allowing the claim to be filed, and overruling a motion to strike it from the files, on the ground that it was not filed in time, instead of first entering a general order of extension, and then permitting this specific claim to be filed thereunder, was formal only. The county judge had the power to do what he did. He merely exercised an undoubted power in an informal and irregular manner. How far error might have been taken from such proceedings we need not inquire. When the estate proceeded to try the merits of the claim without raising this informality, it certainly waived it. Administrators can not waive the statute of limitations nor the statute of non-claim. But they may waive technical errors and informalities. Administrators, receivers and like officers of the courts do not, by reason of their official or fiduciary relations, occupy any vantage ground as litigants. *Arnold v. Weimer*, 40 Nebr., 216. This very situation was before the court in *Tredway v. Allen*, *supra*, and what has just been said is in full accord with the decision in that case. Our attention has been called to no other authority which proceeds upon such a provision as our section 218. It is sound in principle, gives entire effect to every provision of the statute, and in my opinion ought to be adhered to.

Under the view I take of the jurisdiction of the county court, it becomes necessary to consider certain errors al-

leged to have taken place at the trial had on appeal to the district court, to which the opinion of my Brother OLDHAM properly makes no reference. The estate denied the genuineness of the note sued on. The claimant, upon this issue, introduced evidence tending to show that it was given in the course of a transaction between the claimant and the decedent in which Mr. T. M. Marquett, an attorney at law, represented both parties. The claimant bank was located at Chariton, in Iowa, and the decedent lived in Lincoln, Nebraska. Mr. Marquett lived at Lincoln, also. The testimony tended to show that the decedent had executed a note to claimant which had matured, and that in order to keep its assets in proper condition it sent the note in a letter to Mr. Marquett and asked him to get a renewal. Mr. Marquett died before this case was begun, but his letters to the bank, in which he acknowledged receipt of the request to procure a renewal and promised to do so, and afterwards enclosed a renewal note with a statement that he had procured it as requested, were offered by the claimant. There is testimony to show, and the claimant contended, that the renewal note referred to is the note in suit. In my opinion, these letters were admissible. The circumstances surrounding the execution of the note were highly important upon the issue as to its genuineness, and as the negotiations were carried on by conversations and letters, had the conversations and letters passed directly between the parties thereto, there could be no question. In this case the parties did not communicate directly, but through an attorney who acted for each. Hence their letters or statements to him are clearly admissible. *Boyden v. Burke*, 14 How. [U. S.], 575. There, in an action against a public officer for refusing to give copies of documents in his office, letters from the plaintiff to a person through whom his application was made were held admissible as part of the *res gestæ*. The court said that, in substance, it was "a conversation between the parties reduced to writing." See, also, *Roberts v. Woven Wire Mattress Co.*, 46 Md., 374; *May v. Brownell*, 3 Vt., 463. On this ground the

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letter to Mr. Marquett was admissible. The letters written by Mr. Marquett to the bank were equally a part of the transaction, and were also admissible on another ground. He was an attorney at law, and wrote the letters in the course of his employment as such, as a statement to his client of what he had done in the latter's business. It was his duty to apprise his client that he had carried out his instructions, and he wrote the letter for that purpose. He was dead when this litigation arose. A letter may be a memorandum as much as any other form of writing, and a lawyer's letter to his client is often the only entry which he makes of the acts performed in the course of his business. As a general proposition, memoranda made by a person who is dead, whose duty it was, in the course of business he had undertaken, to do the acts and to make the memoranda of them, are competent evidence to show that such acts were done. *Welsh v. Barrett*, 15 Mass., 380; *Bank of United States v. Davis*, 4 Cranch C. C. [U. S.], 533; *Doe v. Turford*, 3 Barn. & Adol. [Eng.], 898. In *Elsworth v. Muldoon*, 15 Abb. Pr., n. s. [N. Y.], 440, memoranda of a deceased attorney, upon a receipt of a sheriff who had sold land, that he had redeemed the land and taken the receipt for the debtor, were held admissible to prove the redemption. It was as much the duty of Mr. Marquett to write the letter in question as of the several parties who made the memoranda involved in the cases cited to write down what they did. In my opinion, the rulings of the trial court were right.

It is also contended that the verdict is contrary to the evidence; but there appears to be ample evidence to sustain it, and good ground for believing that it is right.

I therefore recommend that the judgment of the district court be affirmed.

SEDGWICK, J., dissenting.

I think that the right construction of the statute is expressed in the opinion of Mr. Commissioner POUND. The county court is a court of record, and has general jurisdic-

tion in the matter of the settlement of estates. Its jurisdiction to adjust claims against an estate is limited by section 218 to two years. Within that time, by express provision of the statute, it has jurisdiction of the subject-matter of the adjustment of such claims. The statute provides that the two years shall run "from the time of appointing such commissioners," and there is no express limitation of the time for allowing claims by the court when no commissioners are appointed; but I do not think that this defect renders necessary the result suggested in the opinion adopted by the court. The statute provides that it shall be the duty of the judge "to receive, examine, adjust and allow all claims and demands of all persons against the estate," if no commissioners are appointed. By a fair construction of the statute, section 218 should be held to prescribe the time in which he shall have jurisdiction to do so when no commissioners are appointed, as well as in cases where they are appointed. He must give the same notice of the limitation of time for filing claims as the commissioners are to give, and the two years prescribed within which he shall have jurisdiction to act upon claims must begin to run not later than the giving of this notice. In cases where no commissioners are appointed we are not compelled to say, either that the judge shall have no time at all in which to act upon claims, or that the time is unlimited. The statute then gives him two years and leaves it to his discretion whether he will hear claims after the time first limited. This discretion is a necessary one. It is not the policy of the law to unnecessarily prolong the settlement of estates, nor by technical restrictions to defeat just claims, fairly presented, without fault or neglect on the part of the claimant. When this claim was filed the court still had jurisdiction of the subject-matter. The question whether it should be allowed to be filed was presented to the court by a motion to strike it from the files because presented after the time first limited, and this was passed upon by the court. By its ruling the court decided to allow the presentation of the claim. The court being a

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court of general jurisdiction, there can be no doubt of its authority to require issues to be made up, and, when a claim of over \$5,000 is resisted, it seems proper that the court should require the administrator to plead the grounds upon which the claim is to be contested. This was done in this case. The answer filed by the administrator clearly waives any supposed irregularities in the proceedings by which the claim was brought into court. Having tried the cause upon the issues so presented, and suffered defeat, it seems clear that the administrator ought not to be allowed to appeal to another court, and there present other and different technical defenses.

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FILED MARCH 19, 1902. No. 11,203.

Commissioner's opinion, Department No. 2.

Judicial Sale: ANNUAL CROPS. Annual crops growing on the land do not pass to the purchaser at judicial sale; and for the purpose of saving the debtor's rights thereto, these annual crops will be regarded as personalty.

ERROR from the district court for Fillmore county.
Tried below before HASTINGS, J. *Affirmed.*

Charles H. and F. W. Sloan, for plaintiff in error.

C. A. Fowler, contra.

OLDHAM, C.

One Nierstheimer owned a farm in Thayer county, Nebraska, of one hundred and sixty acres, upon which George E. Aldrich, the plaintiff in error, had a mortgage. This mortgage was foreclosed by a decree of the district court for Thayer county, in 1897, at the February term thereof. The statutory stay was taken. Nierstheimer, the mortgagor, was in possession of, and was farming, this land and

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in the month of September of the year 1897 he planted forty acres of this land to wheat. On November 15, 1897, he gave to the Bank of Ohioa, the defendant in error, a chattel mortgage on the north one-half of this field of wheat, to secure his note, which he had that day given it for \$850. This note was by its terms due in ninety days from its date. This mortgage was duly filed for record and it is stipulated in the record that this note has not been paid. The land was sold under the decree of foreclosure by the sheriff of Thayer county on January 24, 1898, Aldrich being the purchaser. The sale was confirmed and a deed thereon was issued to Aldrich on March 21, 1898, and Aldrich at once took possession of this land and still has the possession. The bank claimed the right to go upon this land and harvest this mortgaged wheat, and demanded of Aldrich that it be permitted to do so. This was refused by Aldrich, who claimed the wheat by reason of his ownership of the land, and harvested and marketed the same; whereupon the bank brought its action against Aldrich for the conversion of the wheat. This action was tried to the district court of Thayer county (a jury being waived), which resulted in a judgment for the bank for the sum of \$130.76, the value of the wheat, less the cost of harvesting and marketing, from which judgment Aldrich prosecutes error to this court.

The problem for solution, then, is, who was entitled to this wheat,—the mortgagee or the purchaser of the land at judicial sale? There is no question presented as to the validity of this chattel mortgage in its inception. The property was *in esse*, and the right to mortgage is not questioned; but it is claimed that by the confirmation of the sale the title to the real estate on which the wheat was growing passed to Aldrich and carried with it the wheat. So the ownership of this property is dependent on the question, do crops that are not matured, but growing on the land at the time of the confirmation of the judicial sale, pass to the purchaser of the land, or do they remain the property of him who planted them? Phases of this

question have been passed upon by this court. In *Foss v. Marr*, 40 Nebr., 559, this court held: "A matured crop of corn standing ungathered upon land sold at a judicial sale, which was not considered or taken into account by the appraisers in arriving at the value of the premises sold, did not pass to the purchaser at the judicial sale, but remained the property of the mortgagor who had planted and cultivated it." In *Monday v. O'Neil*, 44 Nebr., 724, the court say: "A tenant for years of mortgaged land planted a crop after the rendition of a decree foreclosing the mortgage, the tenant having been a defendant in the foreclosure suit. The land was sold under the decree and the sale confirmed while the crop was growing and before it matured. The purchaser did not obtain possession of the land, but permitted the tenant to retain possession, merely notifying him that he, the purchaser, would expect from the tenant rent in money or in kind. Held, That as between the tenant and purchaser the former was entitled to the crop." In this last case the court did not determine what the rights of the parties would have been had Monday secured possession and evicted O'Neil before the crop matured. But the court in both *Foss v. Marr* and *Monday v. O'Neil* bases its decision on the case of *Cassilly v. Rhodes*, 12 Ohio, 88, and *Houts v. Showalter*, 10 Ohio St., 124. The doctrine of these cases is that annual crops growing on the land do not pass to the purchaser on judicial sale, because in law they are regarded as personalty. We must either accept this classification or reject the doctrine of the Ohio cases absolutely. To reject this would be to overturn *Foss v. Marr* and *Monday v. O'Neil*, which, to the extent they have gone in the application of this doctrine, have become a rule of property in this state; and for this reason we do not feel justified in overthrowing them. This being so, nothing but the other alternative is left to us, which is the acceptance of this classification, and with the Ohio cases hold that the title to the annual crops growing on the lands does not pass to the purchaser on judicial sale, for the reason that the law regards them

as personal property. This being their legal status, the controversy over whether or not they were taken into account by the appraisers becomes immaterial. The appraisers of the land would have no right to appraise the personalty which they may find upon the land. This status of the property also renders the question of possession by the purchaser a plain and reasonable one. It will be conceded that a purchase of real estate would not carry with it the personal property of the vendor. When you buy and receive title to my land, you do not buy my horse, and by the act of buying the land you have acquired no right to the horse. The result would be, and is, the logical sequence of all personal property of whatsoever nature and kind, and hence Aldrich acquired no ownership of this property in controversy by reason of his purchase at judicial sale of the land on which the wheat was growing. Having no ownership, how would the possession of the land give him the right to treat this property as his own and apply it to his own use? Counsel suggest no answer to this question. Nor do we think it could be answered to his advantage. The land passes by a judicial sale, to the purchaser, burdened with any and all the rights of other parties, including the mortgagor, that are not inconsistent with, or opposed to, title. Title, and this alone, is all the court gives the purchaser. From this he may, or may not, according to the circumstances of the case, or the rights of others, have the right of possession. But the possession of the purchaser could not by any reason of that act destroy the rights of others, nor justify him in appropriating other people's property; and it would make no difference to whom it belonged, as it did not belong to him.

The law recognizes the necessity of agriculture and favors its promotion, and, as is said in *Houts v. Showalter*, *supra*, "Under our system, frequent advertisements and offers for sale, and occasionally revaluations are necessary, before a sale can be effected. When an appraisement is made it can not be foreseen when a sale will be effected. It is not for the interest of any party, nor for the public

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interest, that the land should thenceforth lie waste; then, there may have been no crop sown or planted." This failure to sow or plant is what the law discourages, and it can only encourage sowing and planting under circumstances like these by assuring a man that if he sow, he shall reap.

The judgment of the court below is right and we recommend that it be affirmed.

BARNES and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MARY ANDERSON V. CITY OF ALBION.

FILED MARCH 19, 1902. No. 11,305.

Commissioner's opinion, Department No. 2.

1. Streets and Sidewalks: DEFECT: INJURY: RECOVERY: INSTRUCTION.

A city is bound to keep its streets and sidewalks reasonably safe and convenient for travel; and an instruction which charges the jury that, before a plaintiff can recover for injuries sustained by reason of a defect in a sidewalk, the jury must find "that said defect left the sidewalk in an unreasonably dangerous condition," is erroneous.

2. ———: ———: DUTY OF OFFICER: NOTICE. The law makes it the duty of the officers of a city to exercise reasonable diligence for the purpose of knowing whether or not its avenues of public travel are reasonably safe, and they are not to wait for knowledge of defects or dangerous conditions of its sidewalks until these facts attain notoriety in the city. An instruction which, in effect, charges that the defect in a sidewalk must have been "notorious and continued," before the city can be charged with notice thereof, is erroneous.

ERROR from the district court for Boone county. Tried below before THOMPSON, J. *Reversed.*

C. E. Spear and J. S. Armstrong, for plaintiff in error.

O. M. Needham, contra.

OLDHAM, C.

This is an action brought for damages by Mrs. Anderson, the plaintiff in error, against the city of Albion, for injuries received by her, alleged to have been occasioned by a defective sidewalk in that city. The petition alleges, and the testimony tends to show, that on one of the main traveled streets of that city was a wooden sidewalk, in which was a loose and broken plank; that this plank was immediately over an excavation from two to three feet deep; that Mrs. Anderson, in passing over this sidewalk, stepped on this broken and loose plank, which gave way, causing her to fall into the excavation, and thereby she sustained the injuries complained of. She testified that this broken plank was in place when she stepped upon it. Other witnesses testified that this plank had been broken for some days prior to the accident, and some of the time it was in place and at other times it was lying out of place, exposing the defect in the sidewalk and the excavation under it. The city filed its answer admitting its corporate capacity, and that the place of the alleged injury was a street with a sidewalk thereon; denied the other allegations of the petition, and then pleads affirmatively contributory negligence on the part of plaintiff. To this answer plaintiff filed a general denial. The case was tried on these issues to a jury, who returned a verdict for the city, on which judgment was entered and plaintiff below prosecutes error to this court.

The principal errors assigned are that the verdict is not sustained by the evidence, and that the court erred in giving certain instructions. In view of the fact that instruction No. 12, given by the court, can not be sustained on any hypothesis, and contains prejudicial error, which will call for a reversal of the judgment below, and another trial of these issues, we shall refrain from passing on the sufficiency of the evidence to sustain the verdict. This instruction is as follows: "The jury are instructed that before they can find for the plaintiff, they must find the

plaintiff has suffered injury; that the injury was caused by a defect in the sidewalk; that said defect left the sidewalk in an unreasonably dangerous condition; that the plaintiff did not contribute to said injury by any negligence on her part; that the city authorities had actual knowledge of said defect in time to have repaired same before the accident happened, or that the defect had been notorious and continued for a length of time within which the city authorities, in the exercise of reasonable care and diligence, could have known of the same." Among the various propositions laid down in this instruction there are two which misstate the law, viz.: First, "that said defect left the sidewalk in an unreasonably dangerous condition"; and, second, "that the city authorities had actual knowledge of said defect in time to have repaired same before the accident happened, or that the defect had been notorious and continued for a length of time within which the city authorities, in the exercise of reasonable care and diligence, could have known of the same." As to the first proposition, a city of this state is intrusted by law with the charge, direction and control of the streets, sidewalks, culverts and bridges of the city, and is burdened with the duty to use reasonable care and diligence in making and keeping the streets and sidewalks safe and convenient for travel. In short, it is bound to keep its streets and sidewalks thereon reasonably safe and convenient for travel. When its sidewalks are even dangerous without being "unreasonably dangerous," it has failed in its duty in this respect; and hence the conditions of dangerous and "unreasonably dangerous" are conditions of its streets under which it can not justify defects therein which result in injuries to the traveling public. As to the second proposition, the rule is laid down tersely by Judge Dillon in his work on Municipal Corporations (vol. 2, sec. 1025), in which he says: "The corporation, in the absence of a controlling enactment, is responsible only for a reasonable diligence to repair the defect or prevent accidents after the unsafe condition of the street is known, or ought to

have been known to it, or to its officers having authority to act respecting it. A corporate body never can either take care or neglect to take care except through its officers or servants. If such a body, by its officers or servants, has the means of knowing that a street is unfit for travel, and is negligently ignorant of its state, it is guilty of negligence." This court, in the case of *City of Lincoln v. Smith*, 28 Nebr., 762, held that, to render a city liable for injuries caused by defective sidewalks, it is not necessary that it should have had actual notice of the defect. If a state of facts exist, such that ignorance can only arise from a failure to exercise reasonable official care, notice will be presumed. In *Pomfrey v. Village of Saratoga Springs*, 104 N. Y., 459, the court said: "Actual notice to the proper municipal authorities of a defect is not necessary in order to charge it with negligence; they owe to the public the duty of actual vigilance; and where a street or sidewalk has been out of repair for any considerable length of time, so that by reasonable diligence they could have notice of the defect, such notice may be imputed to them." The law casts on the officers of a city the obligation of vigilance and reasonable diligence to keep its streets in a reasonably safe condition, and this obligation is not discharged nor condoned by waiting until the "defect had become notorious." In other words, the law makes it the duty of the officers of the city to exercise reasonable diligence for the purpose of knowing whether or not its avenues of public travel are reasonably safe, and they are not to wait for knowledge of defects therein until they attain notoriety in the city.

We therefore recommend that the judgment of the lower court be reversed and this cause remanded for further proceedings according to law.

BARNES and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

CITIZENS' BANK OF HUMPHREY V. FREDERICK FROMHOLZ.

FILED MARCH 19, 1902. No. 11,358.

Commissioner's opinion, Department No. 2.

1. **Bank: PRESIDENT AND CASHIER: DEPOSIT: COLLECTION FOR CUSTOMER: DENIAL OF AUTHORITY: LIABILITY.** When the president and cashier of a bank, acting in his official capacity for such bank, collects money for and places it on deposit in such bank to the credit of one of its customers and pays out of such deposit notes due to the bank from the customer and checks drawn by him against such deposit, the bank can not, for the purpose of escaping liability to its customer for the mistakes or malfeasance of its president and cashier, deny his authority to represent it in this kind of a transaction.
2. ———: **DEPOSITOR: STATUTE OF LIMITATIONS: DEMAND.** As between a bank and one of its depositors, the statute of limitations does not begin to run in favor of the bank, until a demand has been made for the money on deposit.
3. **Cross-Examination: PRACTICE: DISCRETION OF COURT.** The practice of permitting two counsel on the same side to examine a witness is not commended as a rule, but the privilege nevertheless rests solely within the discretion of the trial court.

ERROR from the district court for Platte county. Tried below before HOLLENBECK, J. *Affirmed.*

McAllister & Cornelius, for plaintiff in error.

Talbot & Allen and Julius S. Dittmar, contra.

OLDHAM, C.

This was an action by a depositor against the Citizens' Bank of Humphrey, Nebraska, to recover back the sum of \$578.20 alleged to have been erroneously charged to plaintiff's account by the defendant bank on the 30th day of May, 1893. The suit was not filed until the 24th day of September, 1898. Plaintiff, however, alleged in his petition that he did not discover the mistake in the overcharge of his account until September, 1898. The defendant bank answered plaintiff's petition with a general denial and a plea of the statute of limitations. Plaintiff replied to this answer with a general denial. There was a trial of the

issues thus joined to a jury and a verdict for plaintiff. Judgment was entered on the verdict, and defendant brings error to this court.

The facts in this case, as shown by the bill of exceptions, are that the plaintiff in this cause of action was a farmer living near Humphrey, and was a customer of the defendant bank for about four years. It appears that in January, 1893, he was considerably indebted to the bank on notes which the bank held against him, and also on some overdrafts; that at the time he was preparing to remove to the territory of Oklahoma; and that he came into the bank and had a settlement for his notes and overdraft, and paid them by secured notes which he executed for that purpose. It also appears that plaintiff removed to Oklahoma, and that he left some notes for collection with the defendant bank, and that he also authorized the president and cashier of the defendant bank to negotiate a sale of his lands in Platte county, Nebraska. It appears that this sale was negotiated, and the proceeds of the sale were placed to his credit in the defendant bank by the cashier, and that the notes that he owed to the bank were taken out of the proceeds of this sale. It also clearly appears that the bank charged his account with a note of \$500, and interest thereon, which all amounted to \$578.20, and that this charge was made on the 30th day of May, 1893, and that this was one of the notes that had been settled for by plaintiff in January, 1893,—so that the question of the mistake in the account was clearly and unmistakably proved. The bank did not introduce its books in evidence and appeared to rely solely on the statute of limitations as a defense. It seemed, by inference, to have contended that plaintiff's account at the bank was kept by the president and cashier, E. A. Stockslager, as agent for plaintiff, and that the bank, as such, had no interest in this matter. To sustain this theory, it contends that Stockslager collected plaintiff's money and sold his farm and made the deposit for plaintiff, and that the checks which plaintiff drew against his account were mailed from

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Oklahoma to Stockslager. This may be, and was, true; but Stockslager was the president and managing officer of the defendant bank and when he collected notes for plaintiff he credited plaintiff with the collection on the books of the bank. When he received a check from plaintiff, it was paid out of the money plaintiff had on deposit in the bank and charged to him on the books of the bank. In all these transactions Stockslager was acting strictly within the line of the duties devolving upon him as president and cashier of the defendant bank, and hence the bank can not now, for the purpose of avoiding the legal consequences of his malfeasance or mistake, be heard to repudiate his authority. It appears from the evidence that Stockslager left the employ of the defendant bank on the 1st of July, 1894, and that the plaintiff had no further dealings with the bank after that time until this controversy arose. Plaintiff testified that he failed to get a full statement of his account from the defendant bank until he came back to Humphrey in September, 1898, and that he then procured a statement of his account from the new cashier of the bank, and that as soon as he got this statement he discovered the mistake, and demanded payment of the balance due him, and on this demand being refused he at once instituted this suit. The question then arises as to when the statute of limitations began to run in this case. The rule seems to be that, as between a depositor and a bank, the statute of limitation does not begin to run until a demand is made for the money on deposit. This rule seems to be grounded on a sound principle, because the contract between a bank and a customer who opens a check and deposit account with it is not that the bank will pay the whole amount of the deposit at any particular day, for this would constitute a time deposit, rather than a check and deposit account, but the contract is that it will pay the amount of the deposit whenever it is demanded. Consequently in the case at bar the defendant bank was not in default for non-payment of the amount due plaintiff until such amount was demanded, and this demand was not

made until a few days before this suit was commenced. And if the testimony of plaintiff at the trial below is to be believed, he was not negligent in making this demand, because he had no means of knowing how much, if anything, was owing to him from the bank until he procured a full statement of his account from its managing officers in September, 1898. *Goodell v. Brandon Nat. Bank*, 63 Vt., 303, 21 Atl. Rep., 956; Wool, Limitation [3d ed.], sec. 17; *Thomson v. Bank of British North America*, 82 N. Y., 1; *Brahm v. Adkins*, 77 Ill., 263, 265.

Some objection is made in the brief of defendant bank to the action of the trial court in excluding some correspondence offered by defendant between the plaintiff and Stockslager, but all the correspondence excluded was about matters which threw no light on the question in controversy, and hence the action of the trial court was fully justified. Only one of the instructions given by the learned trial court is assailed in the brief of defendant bank. This was the fifteenth instruction given by the court, which told the jury, in substance, that if they found for plaintiff they should fix the amount of his recovery at \$578.20, and interest at seven per cent. from the time of demand. As the evidence clearly showed that plaintiff was either entitled to that amount or nothing, we can not imagine what error is concealed in the instruction.

It is also urged that the court erred in permitting two of plaintiff's counsel to question the same witness, over the objection of defendant. While we do not commend this practice, as a rule, yet it is a matter that is purely within the discretion of the trial court.

Finding no error in the record, we recommend that the judgment of the lower court be affirmed.

BARNES and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

Lydick v. Chaney.

JONATHAN LYDICK, APPELLANT, v. MARY E. CHANEY ET AL.,
APPELLEES.

FILED MARCH 19, 1902. No. 11,127.

Commissioner's opinion, Department No. 2.

1. **Executor: FINAL REPORT: PERSONAL LIABILITY.** The decree of a county court, after examination of the final report and accounts of an executor, finding that he has assets in his hands and ordering them distributed among creditors and legatees, creates a personal liability in the executor, and has the same force as any other judgment.
2. ———: **REMEDY ON BOND NOT EXCLUSIVE.** Such liability may be enforced either directly against the executor, or by suit upon his bond, as circumstances may require.
3. **Final Decree: EXECUTION.** Execution may issue to enforce such a decree; and where it is rendered in the district court on appeal from a similar decree in the county court, or where a transcript has been duly filed in the district court, such execution may be levied upon the lands of the executor.

APPEAL from the district court for Burt county. Heard below before KEYSOR, J. *Affirmed.*

H. E. Carter, for appellant.

Willis G. Sears and *George R. Chaney*, contra.

POUND, C.

Upon examination of the final report and accounts of Jonathan Lydick, as executor of Archibald Matthews, the county court for Burt county approved them and found them correct, except as to two certain legacies for which credit was claimed, which were found to remain unpaid. Accordingly a decree was entered approving and confirming the report, with the exception of these two items, and directing the executor to pay them and to pay the costs of administration. An appeal was taken to the district court, where, upon hearing, the same conclusion was arrived at, the executor was ordered to pay the legacies and it was provided that the legatees recover the amount thereof.

The executor having failed to comply with this order, an execution issued, which was levied upon his lands. This suit is brought to enjoin such levy and to enjoin enforcement of the judgment for want of jurisdiction in the district court to render it. A decree was rendered dismissing the suit, and is now appealed from.

Two claims are made by counsel for appellant: (1.) That a decree of distribution rendered by a county court after examination of the final report and accounts of an executor, finding that he has assets in his hands and ordering them distributed among creditors and legatees, does not create any personal liability in the executor. (2.) That even if it did create such liability, the only method of enforcing it would be by suit upon the executor's bond; that the county court could not enforce its judgment or decree of distribution by execution, and in consequence the district court, upon appeal, would be equally without such power.

The first contention is disposed of by section 255, chapter 23, Compiled Statutes, which provides: "Whenever a decree shall have been made by the probate court for the distribution of the assets among the creditors, the executor or administrator of the estate, after the time of payment shall arrive, shall be personally liable to the creditors for their debts, or the dividend thereon, as for his own debts, or he shall be liable on his bond." It has been said that the decree of distribution and order to pay debts and legacies "corresponds, in some measure, to the judgment *de bonis propriis* at common law." 2 Woerner, Law of Administration, sec. 411. And this view has been taken under statutes substantially the same as our own. *Bank of Orange v. Kidder*, 20 Vt., 519, 523; *Allen v. Smith*, 72 Miss., 689. It is true there are rulings to the effect that the decree of distribution is a mere finding of amounts due, and has not the full force of a judgment. *Piggott v. Ramey*, 1 Scam. [Ill.], 145; *Green v. Fagan*, 15 Ala., 335. But in such cases it will be found that the courts of probate were of limited jurisdiction. *Matthews v. Hoff*, 113 Ill., 90. (With

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General jurisdiction
us the county court has full and exclusive original jurisdiction over the settlement of estates. Getting its powers from the constitution, as to probate matters, it is a court of general jurisdiction. *Johnson v. Beazley*, 65 Mo., 250; *Russell v. Lewis*, 3 Ore., 380; *Monastes v. Catlin*, 6 Ore., 119; *Tucker v. Harris*, 13 Ga., 1. It has equity powers in so far as necessary to give effect to its jurisdiction. *Wilson v. Coburn*, 35 Nebr., 530; *Glade v. White*, 42 Neb., 336. Its powers in probate matters are coextensive with the former powers of courts of chancery in administration suits. *Blanton v. King*, 2 How. [Miss.], 856. All questions relating to the settlement of estates must be adjudicated by it, in the first instance. *Boales v. Ferguson*, 55 Nebr., 565. It would seem clear, therefore, that the executor or administrator, having assets in his hands, may be made personally liable by the final decree of distribution in the county court, just as he might have been formerly by decree in an administration suit. Moreover, the statute indicates as much. Section 289, chapter 23, Compiled Statutes, provides that after payment of debts and expenses of administration, the court "shall, by a decree for that purpose, assign the residue of the estate, if any, to such other persons as are by law entitled to the same." Section 290 reads: "In such decree the court shall name the persons, and the proportions or parts to which each shall be entitled, and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same." In section 291 it is provided: "Such decree may be made on the application of the executor or administrator or of any person interested; but no heir, devisee, or legatee shall be entitled to a decree for his share until payment of the debts and allowances and expense mentioned in the preceding section shall have been provided for." Similar statutory provisions elsewhere have been held to authorize judgments such as the one here in question. *McLaughlin v. McLaughlin*, 4 Ohio St., 508; *Isom v. McGehee's Heirs*, 45 Miss., 712.

We do not think the remedy by suit on the executor's

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bond, as given by section 312 and following of chapter 23, Compiled Statutes, is exclusive. The very language of section 312 indicates that this is an additional protection to distributees, legatees and creditors and an additional remedy, to be resorted to by them if the circumstances so require. But if the liability of the executor may be enforced directly, the parties ought not to be relegated to a separate action unless the statute so requires. (We think the decree of distribution is enforceable by a simpler method wherever the executor is able to respond.) In *Bank of Orange v. Kidder*, 20 Vt., 519, 523, under a statute of the same sort, the court observed that there was no reason why the probate court should not enforce its decrees by execution, if it were given power to issue such a writ. That power exists in this state, by virtue of section 19, chapter 20, Compiled Statutes, and section 18 authorizes transcripts to be filed in the district court, upon which executions may issue as upon judgments of the latter court. Under such circumstances, there is ample authority to the effect that execution may issue as in other cases. *McLaughlin v. McLaughlin*, 4 Ohio St., 508; *Isom v. McGehee's Heirs*, 45 Miss., 712; *Sherwood v. Judd*, 3 Bradf. [N. Y.], 419, 422; *Wachter's Case*, 1 Walk. [Pa.], 267. As the district court rendered the judgment here in question, the execution issued pursuant thereto was leviable upon the lands of appellant, and we are satisfied that the judgment was within the jurisdiction and powers of the court. That is all that is before us. If there were errors in the form of the judgment, the proceedings leading to it, or the findings on which it is based, they should have been raised by petition in error. They are not to be reviewed in this suit.

We recommend that the decree be affirmed.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is .

AFFIRMED.

First Nat. Bank of Greenwood v. Reece.

**FIRST NATIONAL BANK OF GREENWOOD, APPELLEE, V.
THOMAS REECE ET AL., APPELLANTS.**

FILED MARCH 19, 1902. No. 10,420.

Commissioner's opinion, Department No. 3.

1. **Evidence.** Evidence examined, and *held* sufficient to support a finding that a conveyance from a father to a son was fraudulent.
2. **Fraudulent Conveyance: HOMESTEAD.** Where a conveyance of premises occupied as a homestead is set aside as fraudulent as to creditors, the homestead interest of the grantor will be protected as if such conveyance had not been made. *Stubendorf v. Hoffman*, 23 Nebr., 360.
3. **Homestead: EXEMPTION: DEBTS CREATED BEFORE DEATH OF WIFE.** Section 17 of the homestead act exempts to the owner of the fee the homestead premises against all debts existing or created previous to or at the time of the death of his wife, even though he may no longer be the head of a family.

APPEAL from the district court for Cass county. Heard below before RAMSEY, J. *Reversed.*

Allen Beeson, Jesse L. Root and Samuel M. Chapman,
for appellants.

C. S. Polk and Stephen B. Pound, contra.

DUFFIE, C.

This is a creditors' bill to subject to the payment of certain judgments held by the plaintiff the west half of the northwest quarter of section 26, and the east half of the northeast quarter of section 27, township 12, range 9 east of the 6th P. M. as the property of the defendant, Thomas Reece. Thomas Reece and his wife moved onto the land in 1884, the wife holding title. In the year 1890 she conveyed the land to one of her sons, and he, in turn, conveyed it to his father, Thomas Reece. While the record is not clear that this conveyance to the son was for the purpose of placing the title in the name of his father, we infer that such was the case, and that the son never had any

real interest in the property. Reece and his wife continued to occupy the property until the summer of 1890, when they removed to an adjoining farm owned by another son, and rented the home farm to this son. The purpose of such removal, as shown by the evidence, was to better provide for Mrs. Reece, who was sick and not expected to recover, and the son's house was better and more comfortable than the house on the home farm. Mrs. Reece died in the spring of 1891, and Thomas Reece then returned to the farm and boarded with his son. The value of the farm, as shown by the evidence, was from \$6,400 to \$8,000, and it was incumbered by mortgages to the amount of \$3,500. Reece was also indebted to the appellant on unsecured claims to the amount of about \$2,350. About August 15, 1896, Thomas Reece executed a warranty deed conveying the farm to his son Philip for the expressed consideration of \$6,400. In the deed, Philip agreed to assume and pay the mortgages upon the place, and executed to his father five promissory notes, amounting in the aggregate to \$2,900, payable in one, two, three, four and five years, for the balance of the consideration. At the time of this conveyance, Philip Reece, the son, was residing in Montana, and the negotiations for the sale of the farm, if any really took place, were by letters passing between them, none of which appear in the record before us. The plaintiff, the First National Bank of Greenwood, shortly after the conveyance to Philip Reece, reduced its claims to judgment, and had execution issue thereon; and the sheriff's return thereon recites that "after diligent search, I find no goods and chattels whereon to levy belonging to either of the within named defendants; I therefore levied the same on the 24th day of May, 1897, at 11:30 A. M. on the west one-half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$) of section twenty-six (26), and the east one-half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of section twenty-seven (27), township twelve (12), range nine (9), east of the 6th P. M. in Cass county, Nebraska." The petition alleges that the conveyance made to Philip Reece by his father was without consideration, and for the purpose

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of hindering, delaying and defrauding the creditors; that by reason of said conveyance the land can not be sold on execution, or if sold would not bring a sufficient sum to satisfy the claim,—and asks that said conveyance may be set aside and made subject to the payment of the plaintiff's judgments. The answer of the defendants, while denying any fraud in the conveyance of the property, also alleges that, at the time of the conveyance, Thomas Reece had a homestead interest in the farm; and they ask that the plaintiff's petition may be dismissed, or that, in case the court should find for the plaintiff upon the question of the bona fides of the conveyance, that \$2,000 in value of said premises, free and clear from all liens, and exclusive and in addition to the two mortgages thereon, be decreed to be the property of the defendants. A decree was entered as prayed in the petition and from this decree the defendants have appealed to this court.

We think the evidence was amply sufficient to uphold the finding of the district court that the defendant, Thomas Reece, was insolvent, and that the conveyance made to his son Philip was fraudulent as to creditors. It would serve no useful purpose to review at length the evidence on these questions. Suffice to say that the debts due the plaintiff were long past due, and the defendant could not pay them in the usual course of business, as they matured. Judgments were entered thereon and the sheriff's return made on the executions issued show that he could find no property of Thomas Reece out of which to satisfy the judgments, save this farm, the legal title to which stood in the name of Philip Reece. No further or greater proof of insolvency was required. The bona fides of the conveyance to Philip, if submitted as an original proposition to this court, would, we think, have to be determined against the defendants. The deed was made to Philip while he was in Montana and the evidence that any negotiations took place between the parties by correspondence is not of a satisfactory character. No money was paid on the consideration going to the father. Two hundred and eight

dollars was sent by Philip to pay interest due on the mortgages on the farm, but nothing has ever been paid on the notes given to his father. Negotiations were had between the officers of the bank and Thomas Reece and another son, who held a power of attorney from Philip, looking to a sale of the farm, and securing payment to the bank from the proceeds. While Philip testified that he bought the place for a home, we can imagine no good reason for his giving a power of attorney to his brother, unless it was to make a sale. There are other circumstances, which we will not take the time to note, all tending to impeach the bona fides of the conveyance to Philip, and which fully sustain the finding of the district court.

Relating to the homestead claim of the defendants, it is the settled law of this state that creditors can not complain of the transfer of exempt property by their debtor; and in *Stubendorf & Co. v. Hoffman*, 23 Nebr., 360, it was held that a fraudulent grantor of premises occupied as a homestead might assert his homestead exemption, if the court should find against the bona fides of the conveyance; and in *Horton v. Kelly*, 40 Minn., 193, it was held that "where a conveyance is set aside as fraudulent as to the creditors, the homestead interest of the grantor will be protected as if it had not been made." This requires us to consider whether Thomas Reece had a homestead right in the premises at the time of the conveyance to his son. Up to the date of the death of his wife, there can be no doubt that the farm was his homestead. He had occupied it as such from 1884. The removal to the farm of his son in 1890 to give his sick wife the benefit of a better house can not in any sense be considered an abandonment of the homestead. The cases in this state establish the rule that, once a homestead, that character continues to attach to the property until the contrary is shown, and the burden is on those who seek to show an abandonment. *Union Stock Yards Nat. Bank v. Smout*, 62 Nebr., 227. No act of the defendant himself, so far as the record discloses, can be pointed out that goes to impeach his right of homestead in the

premises if his personal status is such as to give him that right. It is insisted that after the death of his wife, there being none of his children residing at home and dependent on him for support, he does not come within the provisions of section 15 of our homestead law. To acquire a homestead in the first instance, there can be no doubt that the party asserting such right must be the head of a family, as defined in section 15 of the homestead act (Compiled Statutes, ch. 36) ; but, the homestead once acquired, its continuance after the loss of his wife, in the absence of children, or when children, if born to him, have attained their majority, and are maintaining themselves, depends, we think, on the consideration to be given section 17 of the act. Section 17 is as follows: "If the homestead was selected from the separate property of either husband or wife it vests, on the death of the person from whose property it was selected, in the survivor for life and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same except the life estate of the survivor by will. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife or either of them previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this chapter." The exceptions mentioned in the latter part of the section, and for which the homestead may be sold, are debts secured by mechanics', laborers' or vendors' liens, or debts secured by mortgage executed and acknowledged by both husband and wife. The statute, in clear and express terms, provides that the surviving husband or wife shall continue to enjoy the benefit of the homestead exemption in cases where the title to the property stands in the name of the deceased spouse. Where the husband, being the owner of the fee of the homestead, dies, the statute is plain that the surviving wife is vested with a life estate therein, free and clear of all debts contracted by herself or her deceased husband prior to or at the time of his death, and it is equally plain that if the fee of the homestead is in

the wife, and the husband survive her, he is vested with a life estate, divested of all debts of either contracted prior to her decease. This is the plain reading of the statute, and the right thus vested in the survivor is not made to depend upon whether any issue resulted from the marriage, but is given regardless of whether there are children to be provided for by the survivor. In such cases it is clear that the survivor may claim the homestead as exempt from prior debts during his or her life, whether the head of a family, as described in section 15 of the act, or not.

It is argued with great earnestness that no provision is made for the continuance of the homestead right in the survivor where he is the owner of the fee, and ceases to be the head of a family, and that in such cases the homestead is liable for debts contracted prior to the decease of his wife. We can not agree with this contention. If we strike from section 17 so much as relates to the right of the owner of the fee to dispose of it by will, subject to the life estate created for the survivor, and providing for the succession of the remainder in the absence of a will, it reads as follows: "If the homestead was selected from the separate property of either husband or wife, it vests on the death of the person from whose property it was selected in the survivor for life. * * * In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife or either of them previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this chapter." The words "in either case" plainly refer to the selection of the homestead. The selection may be made from the property of either the husband or the wife, but in either selection it shall not be liable for debts contracted or existing against both or either previous to or at the time of the death of one of them. The undoubted meaning and intent of the legislature was to vest in the survivor a home which could not be reached for debts contracted prior to the death of his or her spouse, regardless of whether such survivor was the head of a family or not.

Stewart v. Doering.

We therefore recommend that the decree of the district court be reversed, and the case remanded, with instructions to enter a decree preserving to the defendant Thomas Reece, his homestead interest in the property.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed, and the case remanded with instructions to enter a decree preserving to the defendant Thomas Reece, his homestead interest in the property.

REVERSED AND REMANDED.

DAVID STEWART ET AL. V. CATHERINE DOERING.

FILED MARCH 19, 1902. No. 11,176.

Commissioner's opinion, Department No. 3.

Continuance: TRIAL. The continuance of a cause by a justice of the peace is no part of the trial of the cause, within the meaning of section 11, chapter 28, Compiled Statutes.

ERROR from the district court for Saline county. Heard below before HASTINGS, J. *Affirmed.*

A. S. Sands, for plaintiffs in error, cited *Gibson v. Sidney*, 50 Nebr., 12.

J. N. Rickards, *contra.*

DUFFIE, C.

Stewart, the plaintiff in error, is a justice of the peace in and for Saline county, and this action was brought upon his official bond, the breach charged being that he had exacted and collected excessive fees. Judgment went against him, from which he has taken error. The facts are not in dispute, both parties agreeing that the case in which the fee in dispute was taxed came to the plaintiff in error on

change of venue from another justice. On receipt of the transcript, the plaintiff in error docketed the case, and, upon calling the same for trial, it was continued until the 30th of December, 1897. On that date the case was again continued until December 31, 1897, on which day a trial upon the merits was commenced and concluded. Plaintiff in error charged and collected one dollar for "one day's attendance upon the trial after the first day," and the question presented is, was this fee illegally exacted? Section 11, chapter 28, Compiled Statutes of 1901, relating to the fees which may be charged by a justice of the peace, contains the following relating to the fee which may be charged for the trial of a case: "Each day's attendance upon trial of a cause, after the first day, one dollar." The record does not disclose that the case was continued at the instance of either of the parties to the action, and we might well presume that the justice himself continued the case on account of being engaged in other official business, as provided by section 959, Code of Civil Procedure. In such case, it would hardly be contended that entering an order for such continuance was any part of the trial of the cause, such as to entitle the justice to charge a fee of one dollar for attendance upon the trial at a subsequent day when the case was heard and determined. We do not care, however, to dispose of the case on a technicality, as the parties evidently desire the opinion of this court as to the meaning of the statute, and what steps in the progress of a case constitute any part of the trial.

The plaintiff in error, in a vigorous brief, contends that the justice is entitled to charge a fee of one dollar for every day after the return day of the summons that the proceedings in the case require his presence. His argument, if we understand it, is that all the taxable costs in the case previous to a trial on the merits, have been earned on the return day of the summons; that, if the case is tried and disposed of on the return day, no fee can be charged for attendance on the trial; but that if other proceedings in the case are taken by the parties, so that a trial on the

University of Michigan v. McGuckin.

merits can not be had on the return day, such proceedings, including a continuance of the case, are a part of the trial of the cause and constitute the first day of the trial, entitling the justice to a trial fee of one dollar for his subsequent attendance. This argument, it seems to us, not only refutes itself, but is contrary to the practice followed for the many years that the statute has been in force. So far as our knowledge extends, the uniform practice in justice courts has been to tax the fee of fifty cents allowed by statute for each continuance of a case, and this continuance has never been regarded as any part of the trial. If it were, then each continuance, after the first, would entitle the justice to tax as fees, not only the fifty cents specially provided by statute for each continuance, but one dollar in addition for a day's attendance on the trial. In the case at bar the justice would be entitled to charge two dollars for two days on trial of the cause, as the case was continued twice before the day on which it was finally tried on its merits. But on principle, and from the clear reading of the statute, we hold that the postponement of a trial to some future day does not constitute any part of the trial which is so adjourned.

We recommend the affirmance of the judgment.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

UNIVERSITY OF MICHIGAN, APPELLANT, v. DANIEL L. MCGUCKIN ET AL., APPELLEES.

FILED MARCH 19, 1902. No. 10,080.

Commissioner's opinion, Department No. 3.

1. **Marriage: CONTRACT: STATUS.** The marriage relation is, in only a limited, qualified sense, contractual. It is a social *status*, for the assumption of which by persons of the requisite legal capacity, all that is essential is their free consent,

2. ———: ———: LANGUAGE: CONDUCT. The consent requisite to the creation of the marriage relation need not be expressed in any especial manner or by any prescribed form of words, but may be sufficiently evidenced by any clear and unambiguous language or conduct.

APPEAL from the district court for Douglas county. Heard below before KEYSOR, J. Rehearing of case reported in 62 Nebr., 489. *Reaffirmed*. HOLCOMB, J., dissenting.

Wright & Stout, for appellant.

The fact of copulation after a promise *per verba de futuro* is simply evidence from which the court may presume a new promise or a promise *de præsenti*; and the fact of living together is not itself marriage, but is simply evidence from which the court may presume that a promise was made. This presumption, which ordinarily would arise from continued copulation, in the case at bar, is overcome by the positive finding that no new promise was made and the relation was meretricious at its inception. Having been meretricious at its inception, it is presumed to continue meretricious until there is positive evidence of a change or a new promise. So that in this case, even if the court had not specifically found that there was no change and no promise *de præsenti* and no promise at any time when the parties were capable of entering into the relation, the court could not find from the findings of fact that any new promise existed. As to what constitutes a common-law marriage: *Schuchart v. Schuchart*, 61 Kan., 597; *United States Trust Co. v. Maxwell*, 26 Misc. Rep. [N. Y.], 276; *Williams v. Herrick*, 43 Atl. Rep. [R. I.], 1036, and authorities cited on former argument, 62 Nebr., 489.

I. R. Andrews and *J. J. Breen*, *contra*.

AMES, C.

This cause is resubmitted upon arguments and briefs upon a rehearing granted from a former decision in the

same cause, the opinion in which was filed on the 10th day of July, 1901. The case was submitted upon a record containing the pleadings and findings of fact of the trial court, only.

The principal question discussed upon the reargument, and the only one with which we think it requisite to deal in this opinion, is that of the validity of the alleged marriage between the appellees Anna McGuckin and Daniel L. McGuckin. The findings of fact relative to this inquiry are copied in the former opinion and need not be repeated here. The district court found, as a conclusion of law, that they were sufficient to establish the validity of the marriage. In this conclusion this court in its former opinion concurred. The facts found are many of them evidential, rather than ultimate, in character. The beginning of the cohabitation was meretricious, each of the parties having a lawful spouse then living; but both these obstacles were soon afterwards removed by decrees of divorce, and thereafter the parties not only continued for a long term of years to live together as husband and wife, and to enjoy the repute of that relation, but continuously represented themselves to the public and individuals as being such. During the time, and before the making of the mortgage in question, five children were born of the union, whom their parents unitedly represented to the public, and caused to be baptized into church, as the children of lawful wedlock. That these facts and certain others, recited in the finding, would, if standing alone, be sufficient evidence of marriage, can not be doubted, and is explicitly admitted by counsel for the appellant in both brief and argument. But in connection with them, and as a part of the same finding in which they are set forth, the court also found that, although the parties made promises to marry prior to the obtaining of the divorces, yet that such promises "were the only promises ever made, and that no new promise was made after the obtaining of the divorce by Daniel L. McGuckin, nor was there any apparent change in their manner of living or holding themselves out as husband and

wife." Counsel thereupon insists that a lawful marriage could have had its inception only in a promise or agreement of marriage after the removal of the legal obstacles thereto; that the evidential facts found are of no significance, except as tending to establish the making of such a promise or agreement, or of raising a presumption that one had been made, and that whether one had been made was the only ultimate fact in controversy; and that the language quoted above from the finding, being an express negation of such promise, is decisive of the case, so that the evidential facts found are immaterial. In other words, it is contended, as we understand counsel, that a single finding by the court that there was no promise or agreement after obtaining of the divorces would have had the precise legal weight of the actual finding, and that it is not a material inquiry whether the court recited all or only part of the evidence establishing this ultimate fact, because it was not obligatory upon him to recite any of it. We can hardly believe that this is the interpretation which the trial judge himself put upon his findings, and we are not convinced that it is the true one to be given to that document. In our opinion, an express verbal promise or agreement of marriage is not in all cases indispensable under our law. The statute enacts (Compiled Statutes, ch. 52, sec. 1): "In law, marriage is considered a civil contract, to which the consent of the parties capable of contracting is essential." The main purpose of this definition is, we think, to negative the idea that marriage is an ecclesiastical sacrament, or that in the eye of the law it is controlled by the mandates or dogmas, or subject to the observance of the rituals or regulations of any particular churches or sects. That it is not a contract resembling in any but the slightest degree, except as to the element of consent, any other contract with which the courts have to deal, is apparent upon a moment's reflection. This was pointed out by the late Mr. Justice Field, with his usual clearness of expression and wealth of illustration, in *Maynard v. Hill*, 125 U. S., 190. What persons establish by entering into

matrimony, is not a contractual relation, but a social *status*; and the only essential features of the transaction are that the participants are of legal capacity to assume that *status*, and freely consent so to do. It may be true, as counsel for appellant contends, that the indispensable consent can not be implied, but must in all cases be expressed; but it does not follow that it must be expressed in any especial manner, or by any prescribed form of words. The statute above cited dispenses with all ceremonials,—verbal as well as other. It was probably this idea which was in the mind of the trial judge when he penned the words quoted above from his finding. In other words, it appeared to him, as it appears to us, that there was sufficient evidence that after the obtaining of the last divorce the parties consented to assume the *status* of husband and wife, although they made no explicit verbal contract or agreement so to do. Doubtless the very phrase which counsel for appellant regards as establishing the ultimate, conclusive and solely essential fact, the trial judge looked upon as slightly, if at all, material. So construed, his finding is inconsistent neither with itself, nor with the conclusion of law and judgment, and that this is its true interpretation is to our minds perfectly clear. As has already been said, it is conceded, and, indeed, it could not well be disputed, that there is in the finding, aside from this single expression, sufficient evidence of the consent of the parties, after the removal of their disabilities, to assume the marriage relation. That evidence is not rebutted by the mere negative fact that they omitted to express that consent by formal words. The ultimate fact is not that the parties made a formal promise or contract, but that they mutually consented to a social relation. This consent may be expressed by conduct as effectively as by words, and proof of the conduct is proof of the consent. In both cases the conclusion drawn by the court is from an implication, but in either case all that is required is that the expression be clear and unambiguous. In neither case can it properly be said that the contract or the consent is implied.

It is recommended that the former decision of this court be adhered to, and the judgment of the district court affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For reasons stated in the foregoing opinion, it is ordered that the former decision of this court be adhered to, and the judgment of the district court

AFFIRMED.

HOLCOMB, J., dissents.

NOTE.—Marriage, as distinguished from the agreement to marry and from the act of becoming married, is the civil status of one man and one woman legally united for life, with the rights and duties which, for the establishment of families and the multiplication and education of the species, are, or from time to time may thereafter be, assigned by the law to matrimony. So in substance the present author defined in his earliest and all subsequent writings on the subject, and the correctness of the definition has become generally acknowledged. And the old formerly standard definitions which, taking no note of the diverse meanings of the word "marriage," termed it without discrimination a "contract," have been discarded. Now, in the law, a definition is legal doctrine epitomized. To ascertain, therefore, whether or not a proposed definition is correct, we do not compare its terms with those of prior definitions, with *dicta* of the judges, or with words of other learned persons. The test is, whether or not it accurately pictures, in miniature, not what the courts say, but the sum of what they adjudge. And in the barbarous condition of our legal literature, alike in the past and in the present, often is one thing uttered from the bench, and written down as law in our text-books, and the directly opposite is adjudged. A commentator on the law, therefore, should define legal doctrine according to its actual form in practice, not in any erroneous words which a judge or predecessor may have employed. Hence, we know that the foregoing definition of marriage is correct, because it accurately describes what the courts constantly decide. That marriage executed is not a contract we know, because the parties can not mutually dissolve it, because the act of God incapacitating one to discharge its duties will not release it, because there is no accepted performance which will end it, because a minor of marriageable age can no more recede from it than an adult, because it is not dissolved by a failure of the original consideration, because no suit for damages will lie for the non-fulfillment of its duties, because its duties are not derived from its terms but from the law, because legislation may annul it at pleasure, and because none of its other elements are those of contract, but all are of status.

Webster v. Bates Machine Co.

Bishop, Marriage, Divorce and Separation, vol. I., 11, 12 and 13. *Campbell v. Campbell (Breadalbane Case)*, 1 L. R. Scotch & Divorce Appeals, 182; *Collins v. Voorhees*, 47 N. J. Eq., 315. A careful examination will show a distinction between these cases. The *Breadalbane Case* afterward came up in the house of lords on the right of a peer to his seat. He was given his seat. *Breadalbane Peerage Claim*, 1 L. R. Scotch & Divorce Appeals, 259. See, also, *De Thoren v. Attorney General*, 1 L. R. Appeal Cases, 686.

A legal Roman marriage was called *justæ nuptiæ*, *justum matrimonium*, as being conformable to *jus* (civile) or to law. A legal marriage was either *cum conventione uxoris in manum viri*,* or it was without this *conventio*. But both forms of marriage agreed in this: there must be *connubium* between the parties and consent. Biblical, Theological and Ecclesiastical Cyclopædia, vol. V., 799.

A majority of catholic theologians contend that, in marriage, the parties themselves are the ministers of the sacrament. Addis & Arnold, Catholic Dictionary, p. 546.—REPORTER.

JOHN H. WEBSTER, TRUSTEE, v. BATES MACHINE COMPANY.

FILED MARCH 19, 1902. No. 11,318.

Commissioner's opinion, Department No. 3.

1. **Lease: REENTRY BY LANDLORD: DEFAULT IN PAYMENT OF RENT: FORFEIT OF MACHINERY: RIGHTS OF LANDLORD.** When, pursuant to the terms of lease, a landlord reenters because of a default in the payment of rent under a lease covenanting that in such case machinery placed upon the premises by the tenant shall be forfeited to the lessor, the former will succeed to only such title in such personal effects as the latter himself had.
2. **Conversion: TORTIOUS OR OTHERWISE: NOTICE.** When in the absence of any relation of trust or confidence, personal property is taken possession of, tortiously or otherwise, the act alone is notice to the whole world of the nature and extent of the right, title or claim made by the party committing it; and if a person having an adverse claim thereto, fails to assert it or remains in ignorance until after the lapse of the statutory period of limitations, the fault is his own and his right of action therefor is barred. There is no distinction in this respect between actions for the recovery of chattels and those for the recovery of real property.

ERROR from the district court for Buffalo county. Tried below before SULLIVAN, J. *Reversed.*

*With the coming of the wife into the hand of the man.

Dryden & Main and *James H. McIntosh*, for plaintiff in error.

William Gaslin, contra.

AMES, C.

This is an action in replevin which (a jury being waived) was tried upon a stipulation of facts. From this stipulation it appears that John H. Webster, the plaintiff in error, was the owner of the fee, in trust, of a certain manufacturing building and property situate in the city of Kearney in this state. In September, 1892, he executed a lease of the premises to one Barnheisel for a term of years, reserving rent, payable semi-annually. It was covenanted in the lease that the tenant should make certain repairs and improvements, and that, if he should pay his rent promptly when due, he should, at the expiration of his term, have the right to remove from the premises "the buildings which shall have been erected thereon by said second party, during the continuance of this lease, for an engine room and boiler house; also any new boilers and engines placed therein by second party." It was further covenanted "that the second party will put a new floor in the machine room and a new roof on the same; erect new line shaft with proper pulleys; make all necessary additions, repairs to said mill and machinery, all of which additions, repairs and improvements, (except said new boilers and engines, with engine and boiler building) shall be and remain the property of said first party"; but, if the tenant should make default in the payment of rent, the lessor should be entitled to reenter, and in such case all improvements made on said premises should be forfeited to him. The tenant made default of the first instalment of rent reserved by the lease, and the lessor on or about the 20th day of July, 1893, reentered upon the premises and took possession of all the improvements and machinery placed thereon by the tenant, including the engine which is the

subject of this action, claiming title thereto under the above-mentioned covenants of the lease. Before the lease was made of record and before forfeiture thereunder had been incurred, the defendant in error, the Bates Machine Company, without any actual knowledge of the existence of the lease, sold and delivered to the tenant the engine which is the subject of this controversy, upon a written contract that the title to the same should not pass until full payment therefor, and caused the contract to be made duly of record in the office of the clerk of the county. Payment was never made. Upon this state of facts the logical conclusion seems to us irresistible that, as between the vendor of the engine and the lessor of the factory, the former has the better right. The latter is not a purchaser or mortgagee for value, nor is he an attachment or execution creditor. Under the covenants of his lease he was, upon default in payment of rent, to appropriate whatever machinery or appliance belonging to his tenant were to be found upon the premises, but he was not entitled to seize property found thereon, the title to which was in third persons,—especially so if such third persons, at the time they delivered the property upon the grounds, were ignorant of the covenants of the lease or even of the existence of that instrument. The tenant, at the time of the sale and delivery of the engine, was in possession of the factory, with all the external *indicia* of ownership. From all that appears from the stipulation of facts, the vendors had a right to regard him, and did regard him, as the sole owner of the premises. As between the parties to this action the rights of the lessor, at the time he took possession of the buildings and machinery, did not rise higher than those of his tenant; and, as between the tenant and the defendant in error, the title to the machine was unquestionably in the latter.

But the plaintiff in error pleaded the statute of limitations, and upon this plea we think must prevail. It is stipulated that on the 20th day of July, 1893, the lessor "took possession of the said premises in which was the

property involved in this suit and placed a watchman in charge of the same who has been at all times since that date, until the commencement of this suit, in possession of said premises in which the property in question is now and has been situated since said Barnheisel [the tenant] put the same therein in 1892, nor did the said Bates Machine Company demand said property from the defendant herein, until shortly before the commencement of this suit." But it is further stipulated "that when defendant's agent in July, 1893, took possession of said paper mill, in which said property in controversy was left by Barnheisel, he claimed to take possession of said property in controversy herein, and said McIntosh, agent of said defendant Webster, instructed the watchman left in charge of said paper mill to hold all property therein for said Webster, but of this neither plaintiff nor its attorneys or agent nor any one acting therefor had any notice or knowledge whatever." And again, "No notice of the defendant's claim to the property in question was ever given to said Bates Machine Co. or to their attorney, or any of their agents or representatives until the latter part of 1897, shortly after the termination of the case of Henry E. Lewis, Receiver, v. the said Bates Machine Co., hereinbefore referred to." In the interim the suit last mentioned and another action between the defendants in error and another person were prosecuted to determine the title and right of possession of the property. To neither of these actions was the plaintiff in error a party, nor is he, or his agent, McIntosh, shown to have had any knowledge of them, although in both of them attorneys representing him in this suit were counsel adverse to the machine company, and in both cases the property was, by stipulation between the parties thereto, permitted to remain undisturbed in the paper mill during the pendency of the litigation, which terminated in both instances in favor of the machine company. This action was begun on March 16, 1898. From these circumstances and others detailed in the stipulation, the trial court found that the possession of the plaintiff in error was not adverse

to the machine company, until demand and refusal, shortly before the beginning of this action.

The facts being admitted, the question of adverse possession is one of law, and the rule that an issue of fact determined by a trial court from conflicting evidence will not be disturbed is not applicable. When the plaintiff in error took possession of the premises his lease was, and for some time had been, of record in the county. He took open, notorious and exclusive possession under this instrument, which, in terms, entitled him to keep and retain all the fixtures put in the mill by his tenant, including the engines in controversy; and he put an agent in charge, with instructions to hold them for him, which he continued to do for more than four years before this action was begun. There could be no stronger evidence of his intent to hold them adversely to the whole world and to convert them to his own use under a claim of title. This is an action in replevin and there is no allegation or proof of any concealment or fraud, but, if there had been both, they would not have prevented or delayed the running of the statute. If the plaintiff in error was guilty of any wrong it was in the conversion of the property, and the rule is that in such cases the cause of action arises at the date of the conversion, even although it be fraudulent or felonious. Thus it was held in *Howk v. Minnick*, 19 Ohio St., 462, that an action for the wrongful taking of personal property was barred in four years, although the taking was under circumstances constituting larceny, and was concealed from the owner. In *Fee's Adm'r v. Fee*, 10 Ohio, 469, which was an action for money had and received, the court say: "From the statement of the case it is evident that the cause of action accrued on the receipt of the money. In such a case it is not sufficient, in order to avoid the effect of the statute, to aver that the party was ignorant of the fact that he had a cause of action. The plea of the statute goes to the existence of the cause of action, and not to the knowledge of it. This, although it is a sort of elementary principle, and has its foundation in necessity and conven-

ience, has been sometimes questioned, but I am not aware that it has ever been shaken. The case of *Granger v. George*, 5 B. & C. [Eng.], 149, is one of the last in which the point has been made. It was an action of trover. The conversion had taken place more than six years before the commencement of the suit. The plaintiff attempted to avoid the bar of the statute by replying that the fact of the conversion did not come to his knowledge till within six years. But it was held notwithstanding that the statute was a bar, and that the circumstances which were set out in the plea were entirely foreign to the issue." To the same effect is *Campbell v. Roe*, 32 Nebr., 345, the syllabus in which is: "When an agent is appointed to collect money and remit to the principal after deducting his charges, no time being stated when the remittance is to be made, the statute of limitation commences to run in favor of the agent from the time he receives the money." "Mere silence or concealment by the defendant, without affirmative misrepresentation, will not toll the statute."

The underlying reason in this class of cases is that when, in the absence of any relation of trust or confidence, personal property is taken possession of, tortiously or otherwise, that act alone is notice to the whole world of the nature and extent of the right, title or claim made by the party committing it; and, if a person having an adverse claim fails to assert it or remains in ignorance until after the lapse of the statutory period of limitations, the fault is his own, and his right of action therefor is barred. To this effect are *Wood v. Carpenter*, 101 U. S., 135; *Parker v. Kuhn*, 21 Nebr., 413-422; *Conner v. Goodman*, 104 Ill., 365. There is no distinction in this respect between actions for the recovery of chattels and those for the recovery of real property. In either case ignorance of the plaintiff's rights or of the nature of the defendant's claim, does not delay, suspend or prolong the running of the statute.

It is recommended that the judgment of the district court be reversed and a new trial granted.

DUFFIE and ALBERT, CC., concur.

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By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and a new trial granted.

REVERSED AND REMANDED.

JAMES L. GANDY v. ADDISON L. CUMMINS.

FILED MARCH 19, 1902. No. 10,578.

Commissioner's opinion, Department No. 3.

1. **Petition: CAUSE OF ACTION.** Petition examined, and *held to state* a cause of action.
2. **Motion for New Trial: PETITION IN ERROR.** A judgment will not be reversed for errors required to be assigned in a motion for a new trial, unless it is alleged in the petition in error, and shown by the record, that the court erred in overruling such motion. *James v. Higginbotham*, 60 Nebr., 203, followed.

ERROR from the district court for Pawnee county. Tried below before LETTON, J. *Affirmed.*

Samuel P. Davidson, for plaintiff in error.

Story & Story, *contra.*

ALBERT, C.

This is an action at law, brought by Addison L. Cummins against James L. Gandy to recover for money obtained of the plaintiff by the defendant by means of false and fraudulent representations. A trial to a jury resulted in a verdict for the plaintiff, and from a judgment rendered thereon the defendant prosecutes error to this court.

The first question relied on for a reversal is that the amended petition, on which the case was tried, does not state facts sufficient to constitute a cause of action. The allegations of the petition are as follows:

"1. That heretofore to-wit: during the latter part of the year 1890, Ann Fries and John Fries her husband were the

owners of the property known as the Fries Mill property consisting of something less than a quarter section of land together with the mill and other improvements situated in township one, north of range twelve, east in said county of Pawnee and state of Nebraska, did enter into a contract to sell said property for the sum of \$6,500 to the plaintiff in and about which said transaction the said defendant James L. Gandy represented to this plaintiff that he was the agent of the said Ann Fries and did then and there and in that behalf represent and declare to this plaintiff that he had full and entire authority from the said Ann Fries to negotiate and enter into contracts for the sale of her interests in said real estate and to receive the purchase money for her in that behalf, and this plaintiff believing said statements of the said James L. Gandy and relying upon said declarations did negotiate with the said James L. Gandy as agent of the said Ann Fries for the purchase of the said real estate, and relying upon and believing his said representations as to his being such agent of the said Ann Fries did pay to the said James L. Gandy certain money as part of the purchase money for said premises, amounting in all to the sum of \$740 which said money the said James L. Gandy received as a part of the purchase money for said real estate and did promise as such agent of said Ann Fries to faithfully apply said money on the said purchase money by paying the same to the said Ann Fries for whom he pretended to be acting when he received said money.

"2. The plaintiff further alleges that the said James L. Gandy failed, neglected and refused to pay over the said money so received to the said Ann Fries, but corruptly and fraudulently converted the same to his own use, intending and purposing thereby to defraud this plaintiff out of said money and the said defendant did thereby defraud this plaintiff out of the said sum of \$740.

"The plaintiff further alleges that he relied upon the statements of the said James L. Gandy that he was the agent of the said Ann Fries and was authorized to receive

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said money on her behalf and would pay the same to her but, each and all of said statements were false, fraudulent and untrue.

"The plaintiff further alleges that he did not discover until about the 3rd day of May, 1894, that each and all of said statements were untrue, and that the said defendant had not paid said money over to the said Ann Fries as he had agreed to do, but had converted the same to his own use.

"3. There is due the plaintiff from the said defendant for money belonging to the plaintiff and wrongfully and fraudulently converted by defendant to his own use as aforesaid the said sum of \$740 with seven per cent. interest thereon from December 26, 1890, no part of which has been collected and paid, but payment thereof refused by the said defendant."

The sufficiency of the amended petition was first challenged by an objection to the introduction of any testimony in support of its allegations, and again by motion for judgment notwithstanding the verdict. Liberally construed, as we are bound to construe it under the settled practice of this state, the petition charges the following facts:

1. That the defendant falsely and fraudulently represented to the plaintiff that he was the agent of the owner of certain property, with full power to negotiate for its sale, and to receive the purchase price thereof.

2. That the plaintiff, relying upon said representations and believing them to be true, entered into a contract with the defendant, as such agent, for the purchase of said property, and paid him \$740 as a part of the purchase price, to be paid to his alleged principal.

3. That at the time of making such representations, the defendant was not the agent of said owner, and had no authority to negotiate said sale nor to receive the said sum of money, and that said representations were falsely and fraudulently made by him.

4. That the defendant instead of applying the money,

so as aforesaid paid to him, to the purpose for which it was so paid, fraudulently converted the same to his own use.

5. That the plaintiff did not discover the fraud so as aforesaid practiced upon him until the 3d day of May, 1894.

The defendant urges that there is a failure to allege that the plaintiff was damaged by the failure of the defendant to apply said payment as agreed, or that the owner of the property had failed to ratify said sale, and to convey the property to the plaintiff. Those allegations are not essential to plaintiff's theory of the case. From the manner in which the pleading is assailed, it stands confessed that the defendant obtained plaintiff's money by means of false and fraudulent representations. There is no presumption that the owner of the property ever ratified the transaction brought about by defendant's false and fraudulent assumption of agency, nor was the plaintiff required to negative such fact in his petition. In our opinion, the amended petition states a cause of action, and the defendant's objections thereto were properly overruled.

Many other errors are assigned, but they are such as are required to be first brought to the attention of the trial court by motion for a new trial. They were thus presented, and the motion was overruled. That ruling is not complained of in the petition in error. Such omission amounts to a waiver of all errors required to be assigned in such motion. *James v. Higginbotham*, 60 Nebr., 203. Such being the case the record presents nothing further for consideration.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and AMES, CC., concur.

By the Court: For the reason stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MINNA WIRTH V. VINCENT B. CALHOUN ET AL.

FILED MARCH 19, 1902. No. 10,917.

Commissioner's opinion, Department No. 3.

1. **Breach of Contract: MATTER OF DEFENSE.** In an action by an employee against his employer for damages for breach of contract, arising from the wrongful discharge of the former, that the plaintiff obtained, or by the exercise of due diligence, might have obtained, other employment, is a matter of defense, which the plaintiff is not required to anticipate in his petition.
2. ———: ———: **BURDEN OF PROOF.** The burden of proof is on the defendant to establish such defense, and on failure thereof, or of showing other facts in mitigation of damages, the measure of damages is the contract price.
3. **Sunday: CONTRACT: SPORTING.** A contract whereby a party is required to furnish one performance, consisting of music, dancing and feats of contortion, each day of the week, including Sunday, is not invalid as in contravention of section 241 of the Criminal Code; such performances not falling within the prohibition of said section.
4. ———: ———: ———: **PUBLIC POLICY.** The legislature having expressed the policy of the state in regard to the observance of Sunday by said section, the court will not add to the restrictions thus imposed by declaring such contract contrary to public policy.

ERROR from the district court for Douglas county. Tried below before POWELL, J. *Affirmed.*

Charles A. Baldwin, for plaintiff in error:

The contract in this case was in violation of the Criminal Code, section 241. In the Code the descriptive term used is "common labor." This term is defined by lexicographers: "The act of doing or endeavoring to do that which involves hard work, toil or exertion of strength, whether physical or mental, any kind of exertion which involves or is attended with fatigue—the exertion of the body or of the mind in those operations necessary for obtaining the means of subsistence, as distinguished from the exercise of the body in amusement or recreation. The performance

of work or toil." Encyclopædic Dictionary. The courts have construed the term "common labor" to mean the exercise of one's ordinary business calling. *Sellers v. Dugan*, 18 Ohio, 489-493; *Quarles v. State*, 55 Ark., 10; *Bernard v. Lapping*, 32 Mo., 341.

Richard S. Horton, contra, argued that the term "common labor," as used in the statute, meant unskilled labor, citing *Bloom v. Richards*, 2 Ohio St., 387.

ALBERT, C.

It sufficiently appears from the pleadings and the evidence in this case, that on the 12th day of March, 1898, the plaintiffs and the defendant entered into a contract in writing whereby the plaintiffs agreed to give a performance each day of the week, including Sunday, for a period of five months, commencing June 1, at the defendant's music hall in Omaha. These performances were to consist of music, dancing and contortions. In consideration whereof, the defendant agreed to pay them the sum of \$60 per week, and to furnish them with board and lodging. The plaintiffs, in pursuance of this contract, entered into the employ of the defendant, and gave the specified entertainments, in accordance with the terms of the contract, until the 24th day of July, 1898, when they were discharged by the defendant. After the expiration of seven months, they brought an action against the defendant for a breach of the contract. A trial to a jury resulted in a verdict for the plaintiffs. The defendant brings the case here on error.

1. It is urged by the defendant that the petition is defective for the reason that it does not allege that the plaintiffs were wrongfully discharged; that they have sustained damages by reason of such discharge; nor that they were unable to find employment in their line, after such discharge, at the same or better wages. The petition alleges that the plaintiffs kept and performed their part of the contract. This allegation, taken in connection with other parts of the record, amounts to an allegation that they

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kept and performed their part of the contract so far as they were permitted to do so by the defendant. If they kept and performed their part of the contract so far as they were permitted to do so, their discharge was wrongful. As to the omission to allege that they have sustained damages, a sufficient answer is, the petition states the facts, and concludes with the allegation that there is due the plaintiffs, by reason of the matters and things hereinbefore set forth, the sum of \$1,125. As to the failure to allege that they were unable to find other employment, that is a matter of defense, and they were not required to anticipate it. *Hamilton v. Love*, 54 N. E. Rep. [Ind.], 437; *Barker v. Knickerbocker Co.*, 24 Wis., 660; *Strauss v. Meertief*, 38 Am. Rep. [Ala.], 8. There is but one case that we have been able to find holding a contrary view, and that is *Fowler v. Waller*, 25 Tex., 696. There the question is not discussed, nor are any authorities cited.

The fifth instruction to the jury is as follows: "If you find from the evidence that Frederick Wirth had authority to make said contract, or that the defendant with full knowledge of the terms ratified the same, or that an estoppel exists, then you must find for the plaintiffs." The defendant insists that this instruction is in direct violation of the rule announced in *Nebraska Wesleyan University v. Parker*, 52 Nebr., 453. The rule referred to is not new, but has no application here. In that case there was not evidence of a ratification, nor of facts constituting an estoppel. In this there is evidence tending to show both.

Complaint is made of the sixth instruction, on the ground that it "was based on a state of facts not put in issue by the pleadings, and was misleading." The foregoing is the extent of the argument on that point. The instruction is too long to set out in this opinion. We have examined it in the light of the record, and do not believe it is vulnerable to the objection urged. On the contrary, we regard it as a fair statement of the law applicable to the pleadings and facts shown in evidence.

The seventh instruction is as follows: "If you find for

the plaintiffs you will assess their damages at the sum of \$60 per week from July 24, 1898, to October 31, 1898, together with the reasonable value as shown by the evidence of their board and lodging for the same period." The defendant insists that this instruction is erroneous, in that the jury were instructed to allow the full contract price as damages in case they found for the plaintiff. The instruction was proper, under the pleadings and evidence in this case. It is not claimed that there was any evidence tending to show that the plaintiffs had, or, by the exercise of due diligence, might have, secured other engagements, or of any other fact in mitigation of damages. Under such circumstances, the contract price is the measure of damages. See authorities cited *supra* on the question of the sufficiency of the petition.

The defendant complains of the eighth instruction because it directs the jury that, in case they find for the defendant on the contract alleged in the petition, still they should return a verdict for the plaintiffs for \$60; the defendant having admitted that amount to be due. The defendant denied the contract alleged in the petition, but alleged another and different contract. In this connection she pleaded a tender of \$60, and renewed that tender by her answer. In legal effect, that was an admission that she owed the defendants that amount. In view of the rest of the instructions and the record, the instruction was proper, and there is no reasonable probability that the jury were misled by it.

It is further urged by the defendant that the contract is illegal and void for the reason that a part of the performances to be given by the plaintiffs were to be given on Sunday. In the determination of the question thus raised, it is not necessary to enter upon a discussion of the relative merits of the various systems of religion, nor of the advantages resulting to the individual or to society from the observance of one day of the week in a particular manner, because, under our form of government, all so-called Sunday laws, whatever the motives that in-

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spire them, are purely municipal or police regulations. The authority to enact such laws comes from no system of religion, but from the fundamental law of the land. In the exercise of that authority, the legislature enacted section 241 of the Criminal Code, invoked by the defendant, which, so far as is material at present, is as follows: "If any person of the age of fourteen years or upward shall be found on the first day of the week, commonly called Sunday, sporting, rioting, quarreling, hunting, fishing, or shooting, he or she shall be fined in a sum not exceeding twenty dollars, or be confined in the county jail for a term not exceeding twenty days, or both, at the discretion of the court. And if any person of the age of fourteen years or upward shall be found on the first day of the week, commonly called Sunday, at common labor (work of necessity and charity only excepted), he or she shall be fined in a sum not exceeding five dollars nor less than one dollar." If the contract provides for a violation of this section, it is because the performances provided for by the contract fall within the meaning of "common labor" or "sporting." As to the former term, it is clear to our minds that it does not include entertainments consisting of music and feats of a professional contortionist. Section 254 of the Criminal Code provides that words are to be taken and construed in the sense in which they are understood in common language, taking into account the context and subject matter relative to which they are employed. We are confident that in "common language" the term "common labor" is never understood to include such performances. The fact that, in one part of his argument, counsel urges that they are included in that term, and in another as strenuously urges they are included within the term "sporting," would indicate that such entertainments are not common labor. In *Henderson v. Nott*, 36 Nebr., 154, this court says: "The term 'laborer,' in the sense of the statute, is one who is hired to do manual or menial labor for another, but it does not include every person who performs labor for compensation." In *Re Ho King*, 14 Fed. Rep., 724, a

theatrical actor was held not to be a laborer, in the popular sense of the term. It remains, then, to determine whether such performances fall within the meaning of the term "sporting." "Sport" is defined by Webster as follows: "To divert; to make merry; to represent by any kind of play; to exhibit or bring out in public, as to sport a new equipage; to play; to frolic; to wanton; to practice the diversions of the field; to trifle." According to the same lexicographer, "sporting" means "indulging in sport; practicing the diversions of the field." If we use the definition of "sport," instead of the term itself, in defining the term "sporting," the definition would be as follows: (1) To indulge in diverting; (2) to indulge in merry-making; (3) to indulge in representing by any kind of play; (4) to indulge in bringing out in public, as to indulge in sporting a new hat or carriage; (5) to indulge in play or frolic; (6) to indulge in wantonness; (7) to indulge in trifling; (8) practicing the diversions of the field. It is obvious, we think, that the legislature did not employ the term in the sense of the first, second, fourth, fifth or sixth definition above given. They are too broad; they include too much. If adopted in the construction of the statute, our Sunday law would rival the most stringent of the blue laws. The third is a sense in which the term is rarely used, and is illustrated in the Century Dictionary by a line from Dryden: "Now sporting on thy lyre the loves of youth." As thus illustrated, it, also, is too broad, as it includes many common and innocent diversions. The seventh has no application to this case. This leaves the eighth, "practicing the diversions of the field," as the definition the lawmakers most probably had in mind when the law was enacted. This appears still more probable on an examination of other definitions. In the Century Dictionary the general meaning of sporting is said to be "engaging or concerned in sport or diversion;" the specific meaning, "interested in or practicing field sports." To adopt the general definition would be to impose obviously absurd and intolerable restriction on the personal liberty of the

individual. Had the lawmakers held to such strict views of the sanctity of the day as would be implied from imposing such restrictions on mere diversions and amusements, it is hardly probable that they would have framed the law in such language as to permit buying and selling, and the making of contracts on that day. The making of a contract on Sunday is not a violation of the statute. *Horacek v. Keebler*, 5 Nebr., 355. A sale made on Sunday is not for that reason invalid. *Fitzgerald v. Andrews*, 15 Nebr., 52.

From the foregoing considerations, coupled with the knowledge that to witness a desecration of the Sabbath day is extremely offensive to many people, and is by them believed to have a demoralizing effect on the young, we believe the term "sporting," as used in the statute, applies exclusively to diversions of the field and outdoor sports, which, from their nature, are forced upon the attention of the young and those whose religious sensibilities are thereby offended. But whether it should be so restricted or not, we are satisfied that to give such performances as were given in pursuance of the contract in question is not "sporting" within the meaning of the statute. Whether such performances should be permitted on Sunday is a question exclusively for the legislature.

It is suggested in argument that even though the contract is not in violation of the express provisions of the Sunday law yet, as it was to be performed partly on Sunday, it is contrary to public policy. We can not adopt that view. The state having defined its policy in regard to the proper observance of one day of the week by the enactment of a law against Sabbath-breaking, it is not within the province of this court to add to the restrictions thus imposed. And if it were, we are by no means sure that to permit the defendant to withhold from the plaintiffs what has been found to be their just due, would be the best means of impressing the public with a sense of the sure rewards of virtue, and the sanctity of the Sabbath day.

It is also claimed that the verdict is not sustained by

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sufficient evidence. We have examined the evidence with some care, and consider it amply sufficient to that end.

We recommend that the judgment of the district court be affirmed.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

NOTE.—The decision in *Sellers v. Dugan*, 18 Ohio, 489-493, cited in plaintiff's brief, is a construction of a statute identical with section 241 of our Criminal Code, which we adopted from Ohio. But the rule, that one state in adopting the statute of another state adopts the judicial construction placed thereon by the former state and makes it a part of the legislative mandate, no longer obtains in Nebraska. *Morgan v. State*, 51 Nebr., 672.

In an action for trespass on the case, "for that the defendant on the seventh day of October, 1883, at said Manchester, hired of the plaintiff a phaeton buggy, horse and harness, to drive about said Manchester, and it was the duty of the said defendant to drive said horse and use said buggy and harness in a careful and prudent manner. Yet the defendant then and there so negligently, wilfully, carelessly and maliciously managed and drove said team, that said buggy was overturned and broken in pieces," the court found the hire according to the declaration; that the same was paid for in advance; that the defendant broke the buggy through careless management. *Held*, there could be no recovery, because the hiring was upon Sunday. *Ohenette v. Teehan*, 63 N. H., 149, 150, following *Woodman v. Hubbard*, 25 N. H., 67-69.—REPORTER.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V.
NANCY L. FEATHERLY, ADMINISTRATRIX.

FILED MARCH 19, 1902. No. 11,200.

Commissioner's opinion, Department No. 3.

1. **Damages: NEGLIGENCE: BURDEN OF PROOF.** In an action for damages resulting from the alleged negligence of the defendant, when the evidence on the part of the plaintiff is such as to justify a finding that his own negligence contributed to the injury complained of, the burden of proof is on the plaintiff to show the absence of such negligence.

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2. **Charging Jury:** CONTRIBUTORY NEGLIGENCE: BURDEN OF PROOF.
On the facts stated, *held*, that the court erred in charging the jury that the burden of proof was on the defendant to show contributory negligence.

ERROR from the district court for Saline county. Tried below before HASTINGS, J. *Reversed*.

J. W. Deweese, Fayette I. Foss and Frank E. Bishop, for plaintiff in error.

George H. Hastings, contra.

ALBERT, C.

This action was brought by Nancy L. Featherly, as administratrix of the estate of John Raley, deceased, against the Chicago, Burlington & Quincy Railroad Company, to recover damages sustained by the alleged negligence of the defendant, whereby the intestate was struck and fatally injured by moving cars while attempting to cross the defendant's track on a public crossing in the city of Crete. There was a verdict for the plaintiff, and from a judgment rendered thereon the defendant prosecutes error to this court.

Contributory negligence was relied upon as a defense, and touching the question of negligence on the part of the respective parties the court instructed the jury as follows: "The establishment of negligence on the part of defendant by a preponderance of the evidence is necessary before you can find any verdict for plaintiff in any event. If you find there was such negligence on the part of defendant, then the burden of proof is on the defendant to show by a preponderance of the evidence, the truth of its assertion that John Raley was negligent and so helped to cause his own injury." The defendant insists that this instruction is bad, because, from the evidence adduced on the part of the plaintiff in making her case, the jury might justly have drawn the inference that the negligence of the intestate directly contributed to the injury in question, and for that reason the burden of proof was not on the defendant to

show contributory negligence, but was on the plaintiff to show the absence of such negligence. It is the settled rule in this state that in an action for damages resulting from the alleged negligence of the defendant, when the testimony on behalf of the plaintiff is such as to justify a finding that his own negligence contributed to the injury complained of, the burden of proof is on the plaintiff to show the absence of such negligence on his part. *Durrell v. Johnson*, 31 Nebr., 796; *Union Stock Yards Co. v. Conoyer*, 41 Nebr., 617; *Omaha Street R. Co. v. Martin*, 48 Nebr., 65. That the intestate was struck by cars moving on the defendant's track while attempting to pass over one of the public crossings on the defendant's road, and thereby received injuries of which he died in a few hours, for present purposes, at least, may be taken as true. It will be conceded that, even were it conclusively established that such injuries would not have occurred but for the negligent acts or omissions of the defendant, the plaintiff would not be entitled to a verdict, were it also shown that the negligence of the intestate directly contributed to the injury. In other words, notwithstanding the negligence of the defendant, if there was an omission on the part of the intestate to exercise such care and prudence as a man of ordinary care and prudence would have exercised under like circumstances, and such omission directly contributed to the injury in question, there can be no recovery in this case. The circumstances attending the accident are best related by a brother of the intestate, who was with him at the time, and who testified as a witness on behalf of the plaintiff. His testimony, so far as we deem material to the present inquiry, is as follows:

Q. 52. When you got to the railroad track that night, going north, state precisely what happened to you and your brother?

A. Well, we came up near the track and stood there at least two or three minutes. I think there were two—I am favorably impressed with the belief that there were two trains on the track, and we stood some time. I noticed

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particularly that right east there was a car standing, as well as I could see; and after we had staid a certain length of time my brother, John, says, "Now" and we started across with a somewhat hurried step, because of the distance across the track (there being a switch there that increases the width of the track); and, knowing the distance, we hurried over. I do not know how we got over, really. I know that we were struck and boosted off the track. I was unconscious, I could not tell what had happened. It did not seem to me that we realized what had happened, but I lay in such a way that my head was next to the track going north, yet, when I came to, to some extent, my head was laying within a couple of feet of the track. I noticed when a light came, and a light, I think, came from the backing down of the engine, that threw the headlight upon it, so that I could see more what was going on. John laid about six or eight feet from me,—west of me,—lying in the same position. I says, "John, we must get out of here."

Q. 62. I wish you would describe to the jury, Mr. Raley, just the condition of the street and the railway train, or trains that night there at the crossing where this accident occurred.

A. The sidewalk had been filled in with coal and ashes so that it had a tendency to darken everything around about over the right of way; and the train was separated mainly over the sidewalk and the right of way (highway). I thought I could see a car right eastward and the balance of the train to the westward, and we started across, as I said. They were separated in that way, yet I think there were two trains on the track, or cars that were attached to the engine. I don't know how many. The end car was about a rod and a half from the sidewalk standing partly on the right of way (highway).

Q. 63. In which direction from the sidewalk?

A. East of the sidewalk, supposing the streets run east and west and north and south,—the road angles.

Q. 64. On which side of the street was the engine on?

A. The east side.

Q. 65. And the balance of the train,—which side of the street was that on?

A. On the west. They had separated.

Q. 66. Can you tell what it was that struck you, or your brother?

A. The train came right on to us. We had no warning. Evidently, the car. I did not realize that it was the car. I did not realize what it was, it was so sudden, I was so bewildered that it could not have been much else; it could not have been thunder or lightning.

Q. 115. I suppose you were talking as you went along up this street?

A. Yes, sir.

Q. 117. How was your eyesight at that time?

A. Well, my eyesight is poor.

Q. 118. How was your hearing at that time?

A. My hearing is not good, but I think it was better. I am under the impression that up to that date it was better than it has been since.

Q. 119. But it is not very good at any time?

A. I don't hear ordinary conversation.

Q. 164. You were so intent looking out for your footing on the street that you paid no attention to the electric light, and don't know whether there was any light or not?

A. I depended upon my brother. His eyesight was better than mine.

Q. 129. As you approached these switches that night, did you stop and listen to see if you could hear any trains?

A. I don't remember that we did.

Q. 130. Did you and your brother speak of the fact that you were coming to the railroad?

A. No; I don't think there was any conversation on that point.

Q. 131. When you came up to the railroad you walked directly along, as you ordinarily would on the sidewalk, across these tracks, did you?

A. We walked up near the track, and hesitated.

Q. 133. You saw a couple of trains there?

A. I think so. My impression is that there were two trains.

Q. 137. Did you notice that an engine passed over the street going east while you were between the Cosmopolitan Hotel and the railroad track?

A. I did not. I heard the trains in motion, but paid no attention to them. I heard trains on the track.

Q. 138. You and your brother heard trains on the tracks, but paid no attention to them?

A. We knew it was a railroad track, and I very often went up the railroad track home; but because of the darkness, and because of the trains being on the track, as I said a while ago, I went this other way.

Q. 139. At the depot you knew or found out that there were some freight trains on the track so that it would be dangerous for you to go up the track?

A. Yes, sir.

Q. 140. Therefore, you went the ordinary route, by the sidewalk, around by the Cosmopolitan Hotel, and went over in that way, thinking that on that account you would be less liable to get into trouble with the cars?

A. Yes, sir.

Q. 169. Whereabouts were you with your brother that night when you stopped and looked, as you speak?

A. We were on the south side of the track. We were about a rod or a rod and a half from it, standing there near that electric light pole, or some other pole, we stood there a long time.

Q. 170. How long a time did you remain?

A. We were there a good little bit, at least two or three minutes, sure.

Q. 171. Did your brother stop also?

A. Yes, sir.

Q. 172. After you had stopped and looked and listened, then you started across?

A. Yes, sir.

Q. 141. After you had stood a while, when you got to

the tracks, then you started hurriedly to go north,—you and your brother?

A. Yes, sir.

Q. 142. It was just after that you had started to go hurriedly, that some object hit you?

A. Yes, sir.

Q. 173. How far did you proceed or walk after you started—after you stopped and listened—before you were knocked down?

A. We had got, I should think, mainly over the track?

The foregoing is the substance of the evidence tending to show the degree of care exercised by the intestate to guard himself against injury. In view of the rule, touching the question of contributory negligence, hereinbefore stated by giving the instruction complained of, the court, in effect, held, as a matter of law, that the foregoing evidence would not justify a finding of contributory negligence,—in other words, that from such evidence reasonable minds could reach no other conclusion than that the intestate, in attempting to cross the track at the time and in the manner he did, exercised such care as a man of ordinary prudence would have exercised under like circumstances. Negligence is rarely an unmixed question of law. In the present case, whether the intestate was negligent would depend largely on what he saw and heard that was calculated to warn him of danger in attempting to cross the track. It will be conceded that if he saw the approaching cars, but took the risk of crossing in front of them, or was warned of their approach in any such way as would have deterred a man of ordinary prudence, under like circumstances, from attempting to cross the track, he was guilty of contributory negligence. Whether he saw the approaching cars, or was in any way warned of their approach, and what knowledge he had of the risk he assumed in making such attempt, can only be surmised. What the witness whose testimony is quoted, saw or heard, throws little light on the subject, for the reason that both his sight and hearing were defective, and on that account he relied at

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the time on the intestate, who was more fortunate in that regard. Not knowing the nature and extent of the information of the intestate as to the risk he assumed in attempting to cross the track, in our opinion, it can not be said, as a matter of law, that in making such attempt he exercised such care as a man of ordinary prudence would have exercised under like circumstances; nor, in view of the facts, can it be said that, from the evidence quoted, reasonable minds could reach no other conclusion than that he exercised such care. If we are correct in this view, the instruction under consideration is erroneous.

Objections are urged against other parts of the charge to the jury, but, aside from the paragraph just considered, the charge, taken as a whole, in our opinion, fairly states the law applicable to the facts. Other questions are argued, but, as they are not likely to arise on another trial, we have not considered them.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED

ROYAL NEIGHBORS OF AMERICA V. FRANCIS H. WALLACE.*

FILED MARCH 19, 1902. No. 11,335.

Commissioner's opinion, Department No. 3.

1. **Application for Insurance: WARRANTY: CONTRACT: PURPOSE OF PARTIES.** Where to hold that certain statements made in an application for insurance are warranties would defeat the ob-

*Rehearing allowed. Former judgment modified.

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vious purpose of the parties to the contract, they will be held to be mere representations, even though it is stipulated in the policy that they are warranties. The intention of the parties is to be gathered from the entire contract, and not from any one clause contained therein.

2. Representations: COMMON KNOWLEDGE. Where representations are of such a character that their materiality is a matter of common knowledge, upon which reasonable minds could not differ, it is error to submit the question of their materiality to the jury.

ERROR from the district court for Dodge county. Tried below before GRIMISON, J. *Reversed.*

J. G. Johnson, Clark C. McNish and J. F. Hess, for plaintiff in error.

Frank Dolezal, contra.

ALBERT, C.

On the 10th day of September, 1897, the Royal Neighbors of America, a fraternal association, issued a benefit certificate to Ada Wallace, in which Francis H. Wallace was named as the beneficiary. On the 13th day of March, 1898, and while said certificate was in full force, unless void for the reasons hereinafter mentioned, the assured died. In due time, the beneficiary demanded payment of the amount named in the certificate, which was refused. Thereupon he commenced this action against said association to recover the amount due on the certificate. There was a trial to a jury which resulted in a verdict for the plaintiff, and from a judgment rendered thereon, the defendant prosecutes error to this court.

The certificate contains, among other things, the following provisions: "That the application and medical examination, which is made a part hereof, of said Ada Wallace for membership in the beneficiary department of this order, and which is on file in the office of the beneficiary recorder, and is hereby referred to and made a part of this contract for benefit, is true in all respects, and that the

literal truth of such application and each and every part thereof shall be held to be a strict warranty and to form the only basis of the liability of this order to such member and to the beneficiary or beneficiaries, the same as if fully set forth in this benefit certificate. That should said application, and each and every part thereof, not be literally true, then this benefit certificate shall, as to the member, the beneficiary or beneficiaries, be absolutely null and void." At the close of her application, the assured signed a statement, which, so far as is material at present, is as follows: "I have verified each of the foregoing answers and statements, * * * and declare and warrant that they are full, complete and literally true." One question propounded to the assured in the application was, "Have you within the last seven years consulted any physician in regard to personal ailment? If so, give date, disease and physician's name and address." The assured answered, "Yes, Doctor Deveres, at Fremont." The evidence shows that she had consulted, at least, one other physician, during the specified period. The defendant insists that, such being the case, her answer was not "full and complete," within the meaning of the clause just quoted. We think otherwise. The question is not whether she had consulted any physicians, and, if so, to give their names and addresses, but whether she had consulted any physician, and, if so, to give physician's name and address. The assured might well infer from the question that the association wanted the name of some physician she had consulted during that period, and that one such name would serve its purpose. The answer was full, complete, and, as appears from the evidence, literally true. The trial court committed no error in so instructing the jury. In addition to the foregoing, among the questions and answers contained in the application and medical examination, are the following: Q. "Are you now of sound body and mind, in good health, and free from disease?" Ans. "Yes." Q. "Have you ever had any serious illness, local disease or personal injury." Ans. "No." Q. "Have you ever had

any disease of the lungs?" Ans. "No." Q. "Have you ever had any hemorrhages?" Ans. "No." Q. "Have you ever had any consumption?" Ans. "No." It is charged in the answer that the foregoing answers given by the assured, were knowingly and willfully false, that they were material to the risk and were relied upon by the defendant. It is first insisted by the defendant that the trial court erred in holding that such answers were mere representations and not warranties. It is fair to presume that the association dealt with the assured in good faith, and that its acceptance of her premium, receiving her into the order and issuance to her of the certificate in question, was more than an idle ceremony, and that it intended thereby to bind itself by a valid contract of insurance. There are upwards of a hundred questions in the application and medical examination. Many of them are of such a character, that no person, however honest his intentions, could answer them with any degree of assurance that each of his answers was literally true. To hold that such questions and answers amount to warranties would be to impute bad faith to the association in pretending to enter into a contract of insurance with the assured which could become binding upon it by the merest chance. This court has held that such answers are not warranties, but mere representations. *Kettenbach v. Omaha Life Ass'n*, 49 Nebr., 842. We are thoroughly satisfied with the conclusion reached in that case. Such being the rule, the complaint under consideration, as well as those based on the action of the trial court in submitting to the jury the question of the good faith of the assured in giving her answers, falls to the ground.

The question of the materiality of the answers, above set out, was submitted to the jury by the trial court, as a question of fact. In our opinion, this was error. There is evidence at least tending to show that the assured had consumption at the time the application was made, and that she died of such disease. Her answers to the questions under consideration were submitted to the medi-

cal examiner, and formed a part of the information upon which he acted in making a favorable report to the association on her application. The court will take judicial notice of the fact that in forming an opinion as to the physical health and condition of a person a physician is compelled to rely, to some extent, at least, on the statements of the person under examination, and that the value of such opinion depends largely on the truthfulness of such statements. The answers of the assured, and the opinion of the medical examiner, were placed before the association to enable it to decide whether to accept or reject the application. That the risk assumed by an acceptance of the application would depend largely on the facts sought to be elicited by the questions under consideration is a matter of common knowledge; that the nature of the answers of the assured, and of the report of the medical examiner based in part thereon, served as an inducement for the acceptance of the risk, is too clear to admit of doubt. Such being the case, the materiality of such answers is a question upon which reasonable minds could not differ, and its submission to the jury was error. *March v. Metropolitan Life Ins. Co.*, 65 Am. St. Rep. [Pa.], 887; *McGowan v. Supreme Court of Foresters*, 83 N. W. Rep. [Wis.], 775. We are aware of cases which apparently hold a contrary doctrine; but, in such cases, so far as our investigation has led us, the representations were not of such a character as those with which we have to deal in this case. They were such, that their materiality could be determined only in the light of the evidence. In such cases, the materiality is obviously a question for the jury. The record before us presents no such case.

It is recommended that the judgment of the district court be reversed, and the cause remanded for further proceedings according to law.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing

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opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

LUIGUI FELINO v. K. S. NEWCOMB LUMBER COMPANY.

FILED MARCH 19, 1902. No. 11,374.

Commissioner's opinion, Department. No. 3.

1. **Mortgage: DEFAULT: IMMEDIATE POSSESSION.** A provision in a real estate mortgage that, in case of a default in the payment of the debt thereby secured, the mortgagee shall be entitled to the immediate possession of the premises, is valid as to the parties and subsequent purchasers and incumbrancers chargeable with notice.
2. **Foreclosure of Mortgage: RENTS AND PROFITS: ACTION AT LAW.** An action at law for the rents and profits, will not lie on behalf of a subsequent purchaser or incumbrancer against a mortgagee, who has entered upon and retained possession under such provision, but such mortgagee will be held to account therefor in an action to foreclose his mortgage.
3. ———: ———: **DECREE AND SALE.** Where an action to foreclose such mortgage has been prosecuted to a decree and sale of the premises all the parties to such proceedings are thereby concluded as to such rents and profits.

ERROR from the district court for Douglas county. Tried below before KEYSOR, J. *Reversed.*

Weaver & Giller, for plaintiff in error.

Baldrige & De Bord, *contra.*

ALBERT, C.

On the first day of August, 1891, Alva A. Richardson and his wife executed and delivered to Luigui Felino a mortgage on certain real estate in South Omaha, to secure the payment of their note, executed to the same party, for \$2,000, with interest at seven per cent. per annum, pay-

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able semi-annually, according to the tenor of ten interest coupons for \$70 each, attached thereto. The mortgage was duly filed and recorded on the 5th day of August, 1891. In addition to the conveyances and agreements usually found in a mortgage, the mortgage contained the following clause: "And upon forfeiture of this mortgage, or in case of default in any of the payments herein provided the said Luigui Felino shall be entitled to the immediate possession of said premises." On the 15th day of August, 1891, the K. S. Newcomb Lumber Company sold and delivered to the said mortgagors certain material for the erection of a building on the mortgaged premises, and on the 24th day of December thereafter filed a lien therefor against said premises. On the 30th day of October, 1893, the said lumber company filed its petition in the district court against said mortgagors, and others, praying for the foreclosure of its said lien. The mortgagee, above mentioned, was not made a party to the suit. On the 29th day of December, 1894, a decree was rendered in said suit in favor of the lumber company, and on the first day of October, 1895, the premises were sold in pursuance of said decree to the said lumber company, and, in pursuance of an order confirming the same, on the 26th day of October, 1895, a deed issued to said purchaser. On the 21st day of September, 1895, Felino, the mortgagee, commenced an action for the foreclosure of his mortgage, making the said lumber company a party defendant, which action was prosecuted to a decree on the 26th day of May, 1896. In pursuance of this decree, in October, 1896, the premises were sold to Felino, the mortgagee, who on the 31st day of October, thereafter, received a sheriff's deed therefor. On the 2d day of October, 1895, and after the commencement of his suit to foreclose the mortgage, the mortgagors, having made default, surrendered possession of the premises to the mortgagee. On the 26th day of October, 1895, and after having received its deed to said premises, the lumber company demanded possession of the premises from the mortgagee, who was then in possession, which was refused.

On the 21st day of May, 1898, the lumber company commenced the present action against Felino to recover the rents and profits of said premises subsequent to the time it received its deed from the sheriff, issued in pursuance of the decree of foreclosure of its said lien. A trial was had to the court, which resulted in a finding and judgment for the plaintiff. The defendant brings the case here on error.

The theory of the plaintiff in the court below, and the only theory on which the judgment of the district court can be upheld, is that the mortgagor of real property retains the legal title and the right of possession until confirmation of a sale under a decree of foreclosure of the mortgage, and that such right of possession carries with it the right to the rents and profits of the mortgaged premises, and that as plaintiff, by virtue of the sale in pursuance of the decree foreclosing its lien, acquired all the right, title and interest of the owner of the fee in and to the premises in controversy, it thereby acquired their right of possession, and, consequently, their right to the rents and profits accruing subsequently to the issuance of such deed and prior to the sale to the defendant in this case in pursuance of the decree foreclosing his mortgage. In our opinion, this theory is unsound. In the absence of any statutory regulation, the mortgagee is entitled to the possession of the premises. Jones, Mortgages, sec. 667. The only statutory regulation on the subject in this state is that to be found in section 55, chapter 73, Compiled Statutes, which is as follows: "In the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof." This provision leaves it competent for the parties to a mortgage to stipulate for the investiture of the mortgagee with the legal title and right of possession, which carries with it the right to the rents and profits. As we have seen, in this case the mortgage expressly provided that upon the forfeiture of the mortgage, or in case of default in any of the payments, the mortgagee should be entitled to the immediate possession of the premises. Of this provision subse-

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quent purchasers and incumbrancers, including the plaintiff in this case, were as fully charged with notice as with any other provision of the mortgage. In California it is provided by statute that the mortgagee shall not be entitled to possession unless authorized by the express terms of the mortgage. Under this provision it was held that if the mortgagee, after condition broken, take possession by consent of the mortgagor, it is presumed, in the absence of clear proof to the contrary, that he is to receive the rents and profits and apply them to the debt secured, and that he is to hold possession until the debt is paid. *Dutton v. Warschauer*, 21 Cal., 609; *Frink v. LeRoy*, 49 Cal., 314. These cases, while not directly in point, clearly recognize the right of the mortgagee to the possession of the premises under a stipulation like the one under consideration. In *McIntyre v. Whitfield*, 13 Smedes & M. [Miss.], 88, it was held that a stipulation similar to the one contained in defendant's mortgage might be enforced by the mortgagees taking possession and holding it. That the mortgagee in possession would be required to account for the rents and profits, will be conceded, but such account should be taken in the suit to foreclose or in a suit to redeem. The defendant in this case, as we have seen, brought his action to foreclose his mortgage. All the parties, including the plaintiff in this case, were before the court in that suit. Every question involving the amount due on the defendant's mortgage, including the rents and profits received by him, were in issue in that case. The proceedings in that case are conclusive and binding, as to such questions, on all of the parties thereto. It follows that the judgment of the district court in this case is erroneous, and it is recommended that it be reversed, and the cause remanded for further proceedings according to law.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing

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opinion, the judgment of the district court is reversed, and the cause is remanded for further proceedings according to law.

REVERSED AND REMANDED.

G. W. FALSTROM, APPELLEE, v. J. T. BANNING ET AL., IM-
PLEADED WITH WILLIAM FRANKLIN, APPELLANT.

FILED APRIL 2, 1902. No. 11,572.

Judicial Sale: CONFIRMATION: OBJECTIONS: DEFECTIVE RECORD:
PRESUMPTION.

APPEAL from the district court for Custer county.
Heard below before SULLIVAN, J. *Affirmed.*

J. R. Dean, for appellant.

Talbot & Allen and *Alpha Morgan*, *contra.*

PER CURIAM.

The presumptions are all in favor of the regularity of the proceedings had in the district court when a cause is brought here by appeal for review of the proceedings had in that tribunal, and such presumptions will be indulged in until from the record the contrary appears. When objections are made to an order of confirmation of sale of real estate made in judicial proceedings, and the grounds of objections do not appear in the record, it will be presumed that no valid objection was presented, and the order appealed from will accordingly be affirmed. In the record in the present case no grounds for the objection interposed appear in the record, which simply recites that the objections to confirmation were considered and overruled. This ruling will be presumed to be right until it is made to appear affirmatively that some valid objection

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existed against the right to order confirmation, which can not be said by an inspection of the record presented for our consideration. Order

AFFIRMED.

UNION TRUST COMPANY, APPELLEE, v. OSCAR N. DAVIS,
APPELLANT.

FILED APRIL 2, 1902. No. 11,581.

1. Appraisement: EVIDENCE. Evidence examined, and *held* to sustain the trial court in refusing to set aside the appraisement as being too low.
2. Foreclosure: SALE: DEPUTY SHERIFF. Where a decree of foreclosure directs a sale of real estate by a sheriff, such sale is valid if made by the deputy sheriff.

APPEAL from the district court for Custer county. Heard below before SULLIVAN, J. *Affirmed*.

J. R. Dean, for appellant.

Talbot & Allen and *Alpha Morgan*, *contra*.

PER CURIAM.

This is an appeal from an order of confirmation. Two questions are discussed in appellant's brief. The land was appraised at \$2,800, and it is contended that this valuation was too low. One witness on behalf of the landowner testified that the property was fairly worth \$3,200, but this testimony was not sufficient to overthrow the appraisement. There is no merit in the first objection; and the second, which is that the deputy sheriff had no authority to make the appraisement and sale, is equally groundless.

The order is

AFFIRMED.

ANGELINE R. PECK, APPELLEE, V. MARGARETHA STARKS,
APPELLANT.

FILED APRIL 2, 1902. No. 11,442.

1. **Vacation of Sale: LIEN: DEDUCTION BY APPRAISERS: TWO-THIRDS VALUE.** Where property sold in execution of a decree of foreclosure was struck off for more than two-thirds of its gross value, the wrongful deduction by the appraisers of one of the liens in suit will afford no ground for vacating the sale.
2. **Judicial Sale: APPRAISERS: ERROR OF JUDGMENT.** A judicial sale will not be set aside on the ground that the appraisers, through an error of judgment, underestimated the value of the property sold.
3. **"At the Court House."** The south door of a court house is "at the court house," within the meaning of section 503 of the Code of Civil Procedure.

APPEAL from the district court for Sherman county.
Heard below before SULLIVAN, J., *Affirmed*.

Richard G. Nightingale, for appellant.

W. R. Mellor, *contra*.

SULLIVAN, C. J.

Appellants contend that the order of the district court confirming a sale of real estate made by the sheriff of Sherman county under a decree of foreclosure should be reversed for the reason that certain taxes which had been paid by the plaintiff and included in the decree were deducted from the gross value of the land as fixed by the appraisers. It appears that the land sold for more than two-thirds of the gross valuation. This being so, the error in the appraisement was not prejudicial. *La Selle v. Nicholls*, 56 Nebr., 458; *Bernheimer v. Hamer*, 59 Nebr., 733.

Another ground upon which it is claimed the order of confirmation should be reversed is that the appraised value of the property was so low as to afford an inference of fraud or mistake in the appraisement. The appraisers and

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the witnesses who testified for appellant differed greatly in their estimates of the value of the property, but the most that can be said against the appraisement is that it may have been the result of an honest mistake; there is nothing whatever in the record to indicate that it was fraudulent. The fact that witnesses differ from the appraisers in their estimate of the value of property about to be offered at judicial sale affords no reason for holding the appraisement to be illegal. *Wood v. Clark*, 58 Nebr., 115; *Brown v. Fitzpatrick*, 56 Nebr., 61; *Michigan Mutual Life Ins. Co. v. Richter*, 58 Nebr., 463.

A further reason urged against the sale is that it was advertised to take place, and did in fact occur, at the south door of the court house, which is not the door by which access to the court room is gained. The statute provides (Code of Civil Procedure, sec. 503) that all sales of lands or tenements under execution or order of sale shall be held "at the court house," if there be one in the county where such lands or tenements are situate. The south door of the court house must, it seems to us, be "at the court house." The reasoning by which counsel has undertaken to show that it is not, is, we must confess, too subtle and elusive for our comprehension.

The order of confirmation is

AFFIRMED.

MAX ROSENBLUM V. STATE OF NEBRASKA.

FILED APRIL 2, 1902. No. 12,451.

1. **License Tax: PEDDLER: TAXING POWER: POLICE POWER.** The law imposing a license tax upon peddlers (Compiled Statutes, 1901, ch. 77, art. 1, secs. 152-154) has for its object the raising of revenue, and its enactment was an exercise of the taxing power, and not the police power.
2. **Constitutional Law.** It is settled doctrine that the courts will not declare an act of the legislature unconstitutional unless it is manifestly so.

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3. ———: **REVENUE LAW: FINE AND IMPRISONMENT.** The provision of section 154 of the general revenue law authorizing fine and imprisonment as a means of enforcing a license tax does not trench upon the constitution, and is therefore valid. *State v. Green*, 27 Nebr., 64; *Magneau v. City of Fremont*, 30 Nebr., 843, and *Templeton v. City of Tekamah*, 32 Nebr., 542, overruled.
4. **Act: COMPREHENSIVE TITLE.** An act entitled "An act to provide a system of revenue" covers the entire subject of taxation, and comprehends whatever means or machinery the legislature may provide to enforce payment of taxes.
5. **Classification for Taxation.** The provision of the constitution (art. 9, sec. 1) authorizing the taxation of persons engaged in certain occupations, in such manner as the legislature shall direct by general law, uniform as to the classes upon which it operates, forbids partiality and favoritism and makes equality before the law a rule of legislative action. It does not, however, forbid reasonable classification of persons for the purpose of taxation.
6. **Arbitrary Classification: PUBLIC POLICY: DIVERSE LEGISLATION.** Classification, to be valid, must not be arbitrary. It must rest on some reason of public policy,—some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects or individuals classified.
7. **Traveling Vendors: OWN PRODUCTS: PRODUCTS OF OTHERS: DIFFERENCE.** There is such a real distinction between persons who go from house to house and place to place vending their own products and those who sell in the same way the productions of others that the legislature, acting on considerations of general policy, may make it the basis of classification for the purpose of taxation.
8. **Particular Classification.** A particular classification may be valid if the object of the statute is to raise revenue, and invalid if the object is regulation.
9. **Occupation Tax.** The law imposing an occupation tax upon peddlers is sufficiently certain to be capable of enforcement.

ERROR from the district court for Platte county. Tried below before GRIMISON, J. *Affirmed.* HOLCOMB, J., dissenting.

McAllister & Cornelius, for plaintiff in error.

Frank N. Prout, Attorney General, *Norris Brown*, Deputy, and *William O'Brien*, for the state.

SULLIVAN, C. J.

Max Rosenbloom, defendant below, having been convicted of peddling in Platte county without a license, seeks by this proceeding to obtain a reversal of the sentence. The statutory provisions which we have occasion to consider in disposing of the questions presented for decision are found in the general revenue law (Compiled Statutes, 1901, art. 1, ch. 77), and are here set out:

"Sec. 152. Peddlers plying their vocation outside of the limits of a city or town within any county in this state and peddlers selling by sample outside of the limits of a city or town within any county in this state shall pay, for the use of said county, an annual tax of twenty-five (\$25) dollars; those with a vehicle drawn by one (1) animal, fifty (\$50) dollars; those with two (2) and less than four (4) animals seventy-five (\$75) dollars; those with four (4) or more animals one hundred (\$100) dollars. Nothing in this section shall be held to apply to parties selling their own work or production, or educational, either by themselves or employes, nor to persons selling at wholesale to merchants, nor to persons selling fresh meats, fruit, farm produce, trees, or plants exclusively.

"Sec. 153. A certificate or license shall be issued to any such peddler by the county clerk, upon the presentation of a receipt showing the payment of the proper tax to the county treasurer, and such certificate, or license, shall be good only in the county where issued, and shall not authorize peddling in cities and towns.

"Sec. 154. Any person peddling outside the limits of a city or town in any county within this state, without such certificate, or license, or after the expiration thereof, shall be deemed guilty of a misdemeanor, and the person actually peddling is liable, whether he be the owner of the goods sold or carried by him or not, and upon conviction thereof, shall be fined the sum of fifty (\$50) dollars and stand committed until the fine is paid, or he be discharged as provided by law; and if any peddler refuses to exhibit his

license to any person requiring a view of the same, he shall be presumed to have none, and if he produces a license upon trial, such peddler shall pay all costs of prosecution."

It is conceded that the facts alleged in the information exist, but it is insisted that they do not constitute a crime. The argument is that the law taxing peddlers trenches in various ways upon the constitution, and is therefore void. It is said in the first place that the object of the legislation is to raise county revenue, and that revenue measures can not, in this state, be enforced by the infliction of fines or penalties. We agree with counsel in the view that the primary and paramount, if not the only, object of the law, is to obtain revenue, by imposing a tax upon the business of peddling. The only thing the peddler is required to do is to pay his tax, and exhibit the appropriate evidence of payment to any person who may wish to see it. The only thing he is forbidden to do is to pursue his calling without having first paid the tax. No police inspection or supervision is provided for. If the things commanded and forbidden are to be regarded as features of regulation or repression, they are not, to say the least, so pronounced or conspicuous as to suggest the idea that the law is referable to the police power, rather than to the power of taxation. But granting the contention of counsel for defendant that the statute is a revenue measure, pure and simple, we are not able to discover any valid objection to the enforcement of it in the manner provided by the legislature. It is settled doctrine in this and in every other jurisdiction that courts will not adjudge statutes unconstitutional unless they are plainly so. Now with what express provision of the higher law does the statute in question clash? We know of none. It may, perhaps, be said that imprisonment for debt has been abolished; but taxes are not debts, within the meaning of the constitution, and if they were, the provision with respect to a fine and that with respect to imprisonment are not so inseparably connected that they must stand or fall together. "The law abolishing imprisonment for debt," says Judge Cooley, "has no application to

taxes; and the remedies for their collection may include an arrest if the legislature shall so provide." Cooley, Taxation [2d ed.], 17. In speaking of license taxes the learned author further remarks that it is still customary to enforce payment of them by arrest and imprisonment, adding that "a constitutional provision inhibiting imprisonment for debt has no application to the case of a license tax." Cooley, Taxation, 438. Among the many cases sustaining this view, we cite the following: *Appleton v. Hopkins*, 5 Gray [Mass.], 530; *Daggett v. Everett*, 19 Me., 373; *McCaskell v. State*, 53 Ala., 510; *Commonwealth v. Byrne*, 20 Gratt. [Va.], 165; *Denver City R. Co. v. City of Denver*, 21 Colo., 350; *City of St. Louis v. Sternberg*, 69 Mo., 289; *Campbell v. City of Anthony*, 40 Kan., 652; *City of Bozeman v. Cadwell*, 36 Pac. Rep. [Mont.], 1042; *City of Cincinnati v. Buckingham*, 10 Ohio, 257; *In re Dassler*, 35 Kan., 678. Limitations upon legislative power are to be found in written constitutions; it has not been customary to look for them in the opinions of the courts. When it pleased the people of this state to put an end to the ancient practice of seizing the person of a debtor as a means of coercing payment of a debt, they put into the bill of rights this expression of their sovereign will: "No person shall be imprisoned for debt in any civil action on mesne or final process unless in cases of fraud." Bill of Rights, sec. 20. This language is terse and lucid; it means just what it says, and, when considered in the light of familiar history, it seems hardly possible to misunderstand it. It deals only with procedure in civil actions,—actions having for their object the collection of debts; it has no application to the civil liability created by the bastardy act (*Ex parte Cottrell*, 13 Nebr., 193; *Ex parte Donahoe*, 24 Nebr., 66), and it has certainly no relation whatever to criminal actions brought by the state to punish the violation of a public law. The just and humane policy of abolishing imprisonment for debt can not be too highly commended, but an extension of that policy by judicial decision can be defended only on the theory that beneficent usurpation is justifiable.

Three cases decided by this court (*State v. Green*, 27 Nebr., 64; *Magneau v. City of Fremont*, 30 Nebr., 843, and *Templeton v. City of Tekamah*, 32 Nebr., 542) declare that penal provisions of an occupation tax ordinance are unenforceable; but these decisions do not profess to rest in either reason or authority, and are, in our judgment, contrary to both. If they had become a rule of property, we should certainly adhere to them, but since they have not, we think they should not be regarded as binding precedents; and they are accordingly overruled.

Another ground upon which the law is assailed is that section 154, which prescribes penalties for peddling without a license, is not embraced within the title of the act. The title is a very comprehensive one; it is "An act to provide a system of revenue," and, *ex vi termini*, covers the entire subject of taxation; it comprehends the selection of the persons, property and franchises to be taxed, the manner and method of making the assessment, equalization and levy, the amount of revenue to be raised, the means or machinery by which the taxes are to be collected, and many other matters obviously germane to a general scheme or plan for providing funds with which to defray the necessary expense of maintaining a state and local government. A law to provide a system of revenue would be singularly weak and inefficient if it did not make adequate provision for the collection of taxes. In fact, every revenue law does contain such provisions. The usual and appropriate method of enforcing payment of a property tax is by the addition of an increased rate of interest, which is in truth a penalty, and by the sale of the taxed property. But payment of taxes on occupations can not be enforced in this way and hence the ordinary, and often the only effective, method of compelling payment, is by fine and imprisonment of the person upon whom the tax is imposed. In the recent case of *Nebraska Loan & Building Ass'n v. Perkins*, 61 Nebr., 254, it is said: "If no portion of the bill is foreign to the subject of legislation, as indicated by the title, however general the latter may be, it is in harmony

with the constitutional mandate." Tested by this rule it is, we think, entirely manifest that the penal provision of section 154 is covered by the title of the act.

✓ A further contention of counsel for defendant is that, by reason of the exceptions contained in section 152 the law lacks the essential requirement of uniformity. The constitution (art. 9, sec. 1) declares that the legislature may impose a tax upon persons engaged in certain occupations "in such manner as it shall direct by general law, uniform as to the class upon which it operates." This provision undoubtedly contemplates that all persons pursuing the same business or calling under the same conditions and circumstances shall be treated alike, and subjected to the same burdens; in other words, partiality and favoritism are forbidden, and equality before the law is made a rule of legislative action. But as was said by the supreme court of Pennsylvania in *Seabolt v. Northumberland County*, 187 Pa. St., 318, "Classification is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial, or irrelevant ones, used for the purpose of evading the constitutional prohibition." In the case of *State v. Farmers & Merchants' Irrigation Co.*, 59 Nebr., 1, 4, we had occasion to consider this question, and reached the conclusion, after a pretty thorough examination of the authorities, that the "classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified." The real test of the validity of defendant's objection to this statute is not whether the classification is wise and just, but whether the legislature acted arbitrarily,—whether, without an adequate determining principle, it made a division of peddlers into two classes, and then sought to deprive one class of their constitutional right to the equal protection of the laws. If there is a genuine and substantial distinction between persons who go from house to house, and place to place, vend-

ing their own products, and those who sell in the same manner the productions of others, the classification is founded in the nature of things, and is therefore upon a basis everywhere recognized as lawful. Now, there is, in our opinion, such a marked and material difference between the two classes of peddlers as to make it entirely proper for the legislature, acting on considerations of general policy, to tax one class and to permit the other to go free. The man who goes about the country selling what he has himself produced may be presumed to confer a benefit upon the general public by eliminating the profits of the retail merchant, and perhaps even those of the wholesaler and jobber. He has a fixed abode where he produces the things which he sells, and where he may be reached and required to make good his warranties. He is generally the owner of immovable property which is subject to state and local taxation. It may be that he is required by the municipality in which he lives to pay a poll tax and a tax upon his business; to build and repair sidewalks, and keep the same free from snow, ice and other obstructions. He contributes to the social, educational and financial prosperity of the community in which he resides. He bears a just share of the burdens of government. And, in addition to all this, it must be remembered that the sale of his products is only incidental to the business of producing them. These characteristics, speaking generally, distinguish the untaxed peddler from the peddler who is taxed, and they are, it seems to us, quite sufficient to justify the classification which the legislature has made. In *State v. Stevenson*, 109 N. Car., 730, a license tax upon merchants was upheld although it exempted purchasers of farm products from the producers. The court, after observing that the law puts all merchants dealing in farm products purchased of the producers in one class, and all other merchants in another class, and treats all in each class alike, goes on to say: "There is no discrimination in either class. The power to select particular trades or occupations and subject them to a license tax can not be denied to the legisla-

ture—nor the power to tax such trades according to different rules, provided the rule in regard to each business is uniform.” The supreme court of Maine had before it in a recent case the question we are now considering. *State v. Montgomery*, 43 Atl. Rep., 13, 16. In delivering judgment sustaining the law, Savage, J., said: “It is contended that the exception which permits one to peddle without license ‘the products of his own labor, or the labor of his family, any patent of his own invention, or in which he has become interested by being a member of any firm, or stockholder in any corporation which has purchased the patent,’ is a discrimination in favor of some and against others. We do not think so. If one may peddle freely the products of his own labor, so may all. The products may be unlike, but the freedom to prosecute one’s own business and to peddle his own products is free alike to all. So of the other exceptions. While it may happen that various producers may peddle each the product of his own labor without license, but not of the labor of another, still we think this fairly answers the requirements of uniformity. The legislature is the sole judge of the extent to which the business of peddling should be regulated, and its conclusions are final, so long as the burdens imposed do not bear unevenly upon citizens. *Ex parte Thornton*, 12 Fed. Rep., 538.” This decision is in conflict with *State v. Wagener*, 69 Minn., 206, referred to in the brief of counsel for defendant. In each case the statute construed was held to be a police regulation having for its object the protection of the public. In this case we have no occasion to determine which view of the matter is correct, because the classification in our statute was made for the purpose of taxation and not for the purpose of regulating the business of peddling. It is plain, of course, that a particular classification may be valid if the object of the legislation is revenue, and invalid if the object is regulation.

The law is also assailed on the ground that it lacks definiteness and certainty, but we think there is so little merit

in this objection that it may be overruled without discussion.

The judgment of the district court is

AFFIRMED.

HOLCOMB, J., dissenting.

Although entertaining the profoundest respect for the legal ability, erudition and discriminating judgment of my associates, I am unable to concur in the majority opinion formulated by the chief justice in this case, and will, as briefly as is consistent with reasonable clearness of expression of my own views, give some of the reasons which impel me to dissent therefrom.

The conclusion reached necessitates the overruling of several prior decisions of this court, of many years' standing, which have become and should be regarded as the settled law of the state; and this I am unwilling to assent to, because the principle of *stare decisis* is, in my judgment, too lightly regarded, and the overturning of the adjudications referred to is without sufficient cause. The law as therein enunciated has stood unchallenged for over a decade, and should not now, except upon the most weighty and grave consideration, be overturned. The doctrine, as expressed in the overruled decisions, as to the power to enact laws providing for imprisonment to enforce collection of taxes, is itself sound in principle, and supported by both reason and authority. The soundness of these decisions has not been challenged since they were enunciated, and they should not now be overruled unless unmistakably and radically unsound in principle. The course of legislation has been consistent with the constitution as construed in these overruled decisions. The charters and ordinances of the cities and towns have been enacted and enforced in conformity with the law as thus construed. The whole history of jurisprudence of the state lends color and support to the principle as announced therein, to the effect that the collection of taxes is to be enforced by the application of remedies civil only in their nature. It is aptly said

by Mr. Justice White, in a dissenting opinion in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S., 429, 650 (and I can do no better than quote his words): "The conservation and orderly development of our institutions rests on our acceptance of the results of the past, and their use as lights to guide our steps in the future. Teach the lesson that settled principles may be overthrown at any time, and confusion and turmoil must ultimately result. * * * The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people."

It is worthy of note that of the five eminent jurists who have graced the bench we now occupy, and who have all expressly concurred in the views as stated in the several decisions it is now proposed to overthrow, two of them were honored members of the constitutional convention which formulated the organic law of the state which they afterwards were by the people of the state called upon to interpret and expound. Who shall say that these men, not only because of their great learning, but also on account of their presence and participation in the work of that convention, were not in a peculiarly advantageous position, and well qualified to correctly interpret and construe the several provisions of that important document? When it was held in the case of *State v. Green*, 27 Nebr., 64, that an occupation tax is to be collected by distress and sale of the property of the tax debtor in the same manner as the collection of debts generally, and not by imprisonment, the conclusion, I assume, was arrived at on the theory that by the adoption of the constitution, with its provision

against imprisonment for debt in any civil action except in case of fraud, an occupation tax was a debt, within the meaning of the word as used in that instrument, and therefore collection thereof could be enforced only as other civil obligations. The language of the constitution is fairly susceptible of this interpretation without doing violence to any well-recognized rule of construction. If a tax is treated as a debt, as it is by all authorities, then the construction was proper, and the fact that no lengthy reasons were given in support of the decision in no way militates against its soundness. I am aware that in many jurisdictions a distinction is made between a debt created by the levy of taxes and those arising ordinarily between individuals on contract or otherwise. But the reason given for such construction is not free from imperfection, and is in some cases warranted, because of substantial difference in the language of the law which was being construed. The logic of the majority opinion is to hold that in a purely fiscal measure, enacted solely for the purpose of raising revenues, the enforcement of the provisions of the act, and the collection of dues levied thereunder, whether on property, person or business, may be coerced by invoking the aid of the criminal law, and the infliction of fines and imprisonment on the person on whom the obligation rests, regardless of the question of his ability to meet the obligation, or the possession of property or means wherewith to satisfy the same. The doctrine, if extended to its legitimate scope and breadth, authorizes every municipality in the state to levy taxes on the person, property and business of the inhabitants thereof, within the limits of the law, and to coerce payment by arrest and incarceration of the delinquent until the taxes are paid, or until a judgment of fine and imprisonment is satisfied. This, to me, is a startling doctrine, and thoroughly repugnant to our entire system of jurisprudence, and in conflict with the very letter of the constitution itself. Such a construction, it seems to me, is contrary to the constitution, as evidenced by the terms of that instrument, the course of judicial construction since

its adoption, and the character of the legislation enacted with reference thereto. A tax, in this state, has always, so far as my knowledge extends, been regarded as a civil liability of the same general character as other debts, and so considered by both the courts and the legislature. With reference to real estate taxes even the personal civil liability has been eliminated, under the laws in relation thereto as construed by this court; and all such taxes are held to be only a charge against the real estate against which levied, to be satisfied by a sale of the property, and not by recourse to the personal liability of the owner of the property when assessed. A personal property tax, or a tax on a business or calling, has heretofore, I think, without exception, been treated as a civil liability against the person to whom assessed, for the enforcement of which the taxing authorities could resort only to remedies common to the collection of other civil liabilities. In a very recent suit we decided that a civil action was maintainable for the recovery of personal taxes in the same manner as for the recovery of debts generally. *Hoover v. Engles*, 63 Nebr., 688. In fact, the entire history of the state, both judicial and legislative, since the adoption of our present constitution, so far as my knowledge extends, has treated the obligations imposed for revenue purposes on the same plane as debts generally, and the collection thereof to be enforced in a civil action, and not by punishment in a criminal proceeding, by fine and imprisonment. I venture to say that a search will be made in vain for an utterance either by the courts or the legislature of the state during the last quarter of a century indicative of the power of the legislature to authorize the coercion of the payment of the public revenues in a criminal action by fines and imprisonment. Is it not fairly inferable, since the legislature has made no attempt to authorize the enforcement of the collection of the revenues necessary for the expense of government, except by civil remedies, such as are common to the enforcement to all civil obligations, that it, too, has given a construction of the constitution in harmony with

the prior utterances of this court? Is it not reasonable to say that the legislature, enacting laws for the collection of the public revenues, would, in all probability, go as far as its powers were deemed to extend? The necessity for the speedy collection of all such taxes, and that all against whom the charge is made should bear their just proportion of these necessary public burdens, would naturally suggest to any legislative body the wisdom of making the payment of the obligation as certain and prompt as might be done under a full exercise of the powers belonging to the legislature in that regard. Can there exist any reasonable doubt that for over a quarter of a century the legislature and the courts of the state have deemed the power of coercing payment of the public revenues exhausted when all remedies for its collection permitted in actions civil in their nature had been provided for? I am not speaking of license taxes, but of measures purely fiscal, for the collection of revenues generally in support of government, and as the term is ordinarily understood. I shall speak of license taxes later on. If the legislature and the courts during this long period of time have so construed the force and effect of the constitutional provision referred to, then I submit that it is now too late to undertake to give to it an entirely inconsistent and contrary construction. But it is said in the majority opinion that it is not all civil liabilities that are included in the purview of this provision of the constitution, and we are cited to authorities holding to the right of imprisonment under the bastardy act, which is denominated a "civil action." These authorities, however, expressly hold that while the action is in its nature civil, as distinguished from a criminal trial, yet the law, as enacted, is an exercise of the police powers of the state. *Ex parte Donahue*, 24 Nebr., 66. As a police regulation, the imprisonment is lawful, and it was competent for the legislature to provide for imprisonment as a means to the desired end. It is not to be doubted that, in the exercise of the police powers of the state, imprisonment is justified and warranted for the preservation of public morals, good order and the peace and welfare of society.

A similar constitutional provision against imprisonment for debt is found in the constitution of Ohio, from which ours is adopted word for word, and which has existed in that state for over half a century. I have yet to learn of an authority in that jurisdiction, or action by the law-making body, recognizing the power of the legislature to coerce payment of taxes levied for public revenues by fine and imprisonment for failure to pay the obligation thus imposed. Surely this is some indication of the soundness of the construction heretofore given to an identical provision in our own constitution. It is held there, as here, that the bastardy act, providing for a judgment against the putative father, and its enforcement by imprisonment, may be resorted to, and that such judgment is not a debt, within the meaning of the constitutional provision under consideration. *Musser v. Stewart*, 21 Ohio St., 353. While the section has been construed in various ways by the court of last resort of that state, none of the decisions relating thereto give countenance or support to the construction adopted in the majority opinion in the case at bar. In a very early case in one of the inferior courts of that state that provision of the constitution was under consideration, and it is there said: "The 15th section of the first article of the constitution declares, 'That no person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of frauds.' This provision is contained in the bill of rights, and is an explicit declaration that the people have reserved to themselves the sacred boon of personal liberty, and have denied to the government all control over their persons, except for the commission of crimes, and the isolated case of fraud in their business transactions. This declaration is regarded as an ample safeguard, without either legislative or judicial construction, and admits of no such thing by either the one or the other departments of the government." *Messenger v. Lockwood*, 9 West. Law J. [Ohio], 521. This construction appears reasonable and fairly supported by the language used. On the same point it is stated in the syllabus

in *State v. Mace*, 5 Md., 337: "The term 'debt,' in that clause of the constitution which provides that 'No person shall be imprisoned for debt,' is to be understood as an obligation arising otherwise than from the sentence of a court for the breach of the public peace or commission of a crime." I hope I may be pardoned for quoting at some length from the opinion of the court in the case last mentioned, because my own views are reflected therein quite as clearly as I could express them in language of my own choosing. The court says: "The 44th section of the 3d article of the constitution declares: 'No person shall be imprisoned for debt'; and the court of common pleas have decided in this case that a fine imposed by a justice of the peace for a violation of the act of 1854, chapter 138, is a debt within the constitutional meaning of the term. In this view we do not concur. We think the constitution ought to have a common sense interpretation, by which we mean the sense in which it was understood by those who adopted it, and, if it receive such a construction, in our judgment the term 'debt' is to be understood as an obligation, arising otherwise than from the sentence of a court for the breach of the public peace or commission of a crime. Although it is a well recognized canon of construction, that where legal terms are used in a statute they are to receive their technical meaning, unless the contrary plainly appears to have been the intention of the legislature, the principle, however, does not apply to the interpretation of the organic law, which is to be construed, according to the acceptance of those who adopted it, as the supreme rule of conduct both for officials and individuals, and, in conformity with this view, it has been habitual for the supreme judiciary of the United States to derive light and instruction from the commentaries of the framers of the federal constitution. * * * We can not be insensible to the fact that in all the struggles for the abolition of the law for imprisonment for debt, the advocates of the measure contended it was unjust and cruel to place the unfortunate debtor on the same footing with the disturber of the public

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peace, or the perpetrator of crimes punishable by fines. The evident intention of the constitution was to relieve those who could not pay their debts, and not to shield from punishment persons who had violated the public law." The supreme court of North Dakota, speaking on the same subject, though with reference to provisions unlike ours (*Granholm v. Sweigle*, 3 N. D., 476, 479), says: "If not a tortious act (and we think it was not), the appellant would be protected from arrest and imprisonment by section 15 of the state constitution, which provides that 'No person shall be imprisoned for debt unless upon refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law; or in cases of tort; or where there is a strong presumption of fraud.' The term 'debt,' as employed in section 15, *supra*, is manifestly used in a broad sense, and hence will embrace such obligations to pay money as arise upon the law, as well as those which arise upon contract." The supreme court of Georgia, in *Cooper v. Mayor*, 4 Ga., 68, holds that where a tax had been imposed by a city ordinance upon free persons of color, and in case of non-payment the act provided that such person should be arrested and committed to the common jail, and there confined until the same was paid, such imprisonment was repugnant to the laws of the state and therefore void. In the authorities referred to the word "debt," when found in an organic law, is given a broad and popular meaning, as it occurs to me ought to be done. If, as is said, such a provision denied to the government control of the persons of a state, except for the commission of crimes or in cases of fraud, or if the word "debt" is to be understood as an obligation arising otherwise than from the sentence of a court for a breach of the public peace or the commission of a crime, or if it embraces obligations to pay money as arise upon the law, as well as those which arise upon contract, then may it not, in reason, be said that an obligation imposed by the levying of a tax for revenue purposes is a debt fairly within the scope and purview of the word as used in the constitution, and

that the decisions overruled have such support in principle and on authority as not to justify their condemnation in order to adopt a construction which is more technical and less liberal?

In all the authorities cited in the majority opinion, a tax is recognized as a debt, in its broad and comprehensive sense, but is held not to come within the purview of the word as used in the organic law, for different reasons,—some upon one ground and some on others; but the tendency of all is to limit and restrict the meaning, rather than to use it in a popular sense. It is also to be noted that in many of the statutes and constitutions the language used is altogether different in meaning from our own. In some states the exemption from imprisonment for debt is limited to contracts, either expressed or implied, and does not extend to obligations arising *ex delicto*. Surely it will not be contended that under our constitution a civil action for a liability founded on tort can be enforced by imprisonment, and yet, to be consistent, my associates must so construe our constitution, in order to justify the doctrine enunciated. In *Re Dassler*, 35 Kan., 678, cited in the majority opinion, the supreme court of that state holds that “road assessments or levies are not debts within the meaning of the constitutional provision abolishing imprisonment for debt, as such provision applies only to liabilities arising upon contract.” It is evident, by a reading of the opinion, that the right to imprison is also justified as an exercise of the police power. Says the court: “It was decided by this court, in *Re Wheeler*, that ‘the provision of the constitution [sec. 16] declaring “no person shall be imprisoned for debt except in cases of fraud,” applies only to liabilities arising upon contract,’ therefore road assessments or levies are not debts within the meaning of the constitutional provision abolishing imprisonment for debt. The power to impose labor for the repair of public highways and streets has been exercised from time immemorial, and comes within the police regulation of the state or city. A commutation of such labor in

money in lieu of work, while in the nature of a tax, is not in common speech or in customary revenue legislation, understood as embraced in the term tax. The power to impose this labor is exercised for public purposes, and the general good and convenience of the community." *City of Charleston v. Oliver*, 16 S. Car., 47, 52, was a case relative to the right of enforcing payment of a license tax by imprisonment, and it was there held that the abolishing of imprisonment for debt did not apply to debts due as taxes. This case supports the general proposition laid down by Judge Cooley, and is the only one directly in point which may be said to fully sustain the doctrine announced in the majority opinion. In that case, as a reason for adopting the construction which it did, the court says: "The manifest object was to deprive the citizen of the power to have his fellow-citizen imprisoned for non-payment of his debt. This power, in the hands of private individuals, had long been a subject of discussion, and had been previously circumscribed by the enactment of the Insolvent Debtors' and Prison Bounds acts, which had no application to taxes, and the object of the clause in question, undoubtedly, was still further to limit this power by confining its exercise to 'cases of fraud.'"

Some of the authorities cited relate to an exercise of the right of regulation under the police powers of the state, and on decisions of that character I have no comment to offer. This power must be conceded, and is too firmly established in our system of jurisprudence to be regarded as other than one of its important branches, and necessary for the welfare and protection of society.

What I have heretofore said applies only to my conception of the duty of this court to adhere to the precedents already established, and what appears to me to be sufficient reasons therefor. I have only spoken of what, in my judgment, is a very proper construction of the scope and effect of the constitutional provision declaring against imprisonment for debt, when applied to measures for the collection of taxes of a purely fiscal character, and solely for

the purpose of raising revenues for the support of government, whether of the state and its political subdivisions, or of any municipality therein. There is another and equally important view of the question which is being decided when it is viewed and considered as imposing a license tax, as distinguished from the exercise of the taxing power generally. The majority opinion not only, in terms, overrules the three prior decisions mentioned, but in effect, and indirectly, overturns and repudiates the doctrine announced and adhered to in a long line of decisions, beginning with *State v. Bennett*, 19 Nebr., 191, to the effect that an occupation or purely revenue-producing tax can not be levied and collected as a condition precedent to the issuance of a license to engage in the business taxed; that, when so levied and collected, the tax becomes license money, to be disposed of in the manner provided by section 5, article 8 of the constitution. In escaping the provisions of the constitution against imprisonment for debt, my brothers have come in conflict with section 5, article 8, which declares that all license moneys shall be paid into the common-school fund, when collected. This latter section of the constitution by this decision has been restricted in its application, in my opinion, much more than is warranted by its unambiguous language, or than was the evident intent of its framers. It now must read, if I correctly understand the import of this decision, that all license moneys, if collected under an act or ordinance whose chief object and aim is regulation, must be paid into the common-school fund, but, if the main purpose appears to be the raising of revenues, then the license moneys derived therefrom may be applied to any lawful purpose provided by such act or ordinance. To this construction I can not assent. The section, in unmistakable terms, provides that all license moneys shall be paid into the common-school fund. There is no exception or qualification. and if the tax is a license tax, if it is required to be paid as a condition precedent to obtaining the license, or engaging in the business, if it is made unlawful to engage in the

business taxed without a license, then the fees thus derived, by whatever name the act or ordinance may be called, and whatever may appear to be its chief aim and object, are license money, and must go where the constitution directs, or that instrument is violated. This section of the constitution has made it impossible to raise revenue for general purposes by clothing an act in the garb of a license law, and providing for criminal prosecution and punishment as a means of coercing payment of the tax thus imposed. The section decrees, in unmistakable terms, that all moneys so derived shall be paid exclusively into the common-school fund. This court first fell into an error in this respect in the opinion in the case of *State v. Boyd*, 63 Nebr., 829, from which I dissented, where the rule was announced that, in construing ordinances providing for license taxes, if the purpose appeared to be to raise revenues, the money was a tax, but, if regulation was the end and object in view, the money results from an exercise of the police power, and is license money. The standard there set up by which the application of the moneys derived as a result of licensing a business is to be determined was an arbitrary one, and at variance with the intent and meaning of the language used in section 5, article 8, of the constitution, which neither makes nor warrants such distinction. The true rule, in my judgment, should be that if, in such an act or ordinance, there is any element of regulation, a license tax is justifiable, and its payment may be enforced by declaring the business taxed unlawful, and providing for punishment by fine and imprisonment for engaging in the business declared unlawful without procuring a license therefor. If the measure is solely a revenue-producing act, without any element of regulation, and in substance an occupation tax, then it must be justified and enforced under the taxing power, and as a civil liability only. I understand the rule to be of quite general application that, if there is any element of regulation in a licensing tax act, then the act is valid as an exercise of the police power, even though the collection of

revenues be one of the objects, and incidental thereto, and that it is not at all necessary that regulation shall be the paramount aim and object. This court has recognized the distinction between the two forms of taxation in *Pleuler v. State*, 11 Nebr., 547, 566, where it is said: "By the constitution of this state, the legislature, within certain specified inhibitions and limitations, is invested with full legislative power. And this power includes, as no one will deny, that of police regulation, which being neither defined nor specially limited, is practically left by the constitution to legislative discretion, so long as no right secured by that instrument is encroached upon. Taxation is also a legislative power, and is specifically mentioned in the constitution, but always in connection with the subject of revenue, for the support of the government generally, or some particular department or branch of it. And it is in such connection that we find the requirement of uniformity. This being so, we are led to conclude that this constitutional injunction has reference solely to taxation, pure and simple, according to the commonly accepted meaning of that term, for the purpose of revenue merely, and not those impositions made, incidentally, under the police power of the state, exerted either directly or by delegation, as a means of constraining and regulating what may be regarded as a pernicious or offensive act or business,"—citing and quoting from a large number of authorities. The supreme court of the United States says: "The power to license is a police power, although it may also be exercised for the purpose of raising revenue. We can not say, as a matter of law, that when a municipal corporation is authorized 'to regulate, tax and license ferry-boats,' the imposition of a license fee of \$100 per boat is not within the power to regulate and license, and is consequently not within the police power." *Wiggins Ferry Co. v. East St. Louis*, 107 U. S., 365, 27 L. Ed., 419. In *State v. Ashbrook*, 48 L. R. A. [Mo.], 265, 269, it is observed: "In order to sustain legislation of the character of the act in question as a police measure, the courts must be able to see that its object to

some degree tends towards the prevention of some offense or manifest evil, or has for its aim the preservation of the public health, morals, safety, or welfare." Many other authorities might be cited, but the above are deemed sufficient for present purposes. Ordinarily, and I think it was so contemplated by the constitution framers, a license tax arises from an act of regulation, and, as expressed by the United States supreme court, is an exercise of the police power of the state. It is the exaction of a fee for the privilege of engaging in a specified business or vocation. It is not a tax on the business, but is a condition precedent to the right to engage in it. The business is regarded as one requiring regulation, and the fee is exacted as an efficient means of accomplishing the desired result. It is made unlawful, and imprisonment provided as the punishment not for failure to pay the tax, but for engaging in a business declared unlawful unless a permit is granted by the proper authorities to engage therein, and the required fee paid therefor. This is made manifest when it is considered that the offending party becomes guilty by engaging in the prohibited act without a license, and no payment of the required license fee thereafter would purge him of such guilt. He is not imprisoned until he pays the license fee, but until he has paid the fine or served the term of imprisonment imposed for its violation. When a tax is levied solely for revenue purposes, and on different kinds of business or callings, it is properly demoninated an occupation or business tax, and rests on the same general principles as the imposition of taxes generally for revenue purposes. The first is required for the privilege of engaging in the business which he is otherwise precluded from pursuing, and as a means of regulation, and the latter levied on the business he is already lawfully engaged in. With these distinctions kept clearly in mind, the validity of any law on either branch of the subject ought not to be very greatly difficult of determination. The doctrine has never heretofore gained a foothold in this state which authorizes the exaction and collection of a business tax for purely revenue

purposes under the guise of an act to license the business taxed, and with authority to imprison the delinquent if the tax is not paid. And I can not conceive of any state of affairs which would permit this to be done without expressly violating the constitutional provision declaring all moneys derived from licenses must be applied to the one specified purpose.

It is clear to my mind that the act, the validity of which is in question in the present case, is an act of regulation, and was so intended by the legislature, and not an act solely for the purpose of raising revenue, as held in the majority opinion. It seems to me almost too obvious for argument that the amendment of the act of the legislature of 1901 was chiefly for the purpose of better regulating the different kinds of business therein mentioned, and to prevent the indiscriminate peddling by wholly irresponsible parties, to the detriment of the different communities of the state, and to prevent imposition on the people generally. It bears on its face the stamp of regulation, protection to the inhabitants and the preservation of the public welfare. Its tendency is to confine the business licensed in the hands of but a few persons in each county. It has features that would indicate an intent to, in a measure, prohibit, and can this be regarded as other than for the purpose of regulation? The very fact of requiring every person included in the provisions of the act to take out a license before engaging in the business, to have a record of the issuance of the same and the name and residence or location of the party licensed, and to require an exhibition of the license when requested, are all well calculated to act as a regulation, and to dignify the calling in its importance, and to restrict it to the more responsible of those disposed to engage in the business. It is the same regulation and restraint that lies at the foundation of almost every act requiring a license fee to be paid, and the issuance of a license to the person thereby authorized to engage in a business otherwise made unlawful. The statute prior to 1901 provided generally for a tax of

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\$30 on each peddler of watches, clocks, jewelry or patent medicines, and all other wares and merchandise, for a license to peddle throughout the state for one year, and provided a penalty of \$50 for a violation of the act, the guilty party to stand committed until the fine was paid. By the amendment of 1901 the act was made to apply only to peddlers plying their vocation outside the towns and cities, and graduated the tax from \$25 on the walking peddler to \$100 on the one using a team of four horses, and excluded from the provision of the act those who sold their own work or production, or educational, and those selling at wholesale to merchants, and persons selling fresh meats, fruit, farm produce, trees or plants, exclusively. Why these changes in the provisions of the original act, discriminations, and exceptions, if the raising of revenues was the aim and object in view? Who can doubt, in view of these amendments, that the intent of the legislature was to regulate the business of peddling by a certain class that was deemed detrimental to society, and consequently some form of regulation and restraint was required, and that such was the object in enacting the law, rather than that the sole purpose was to raise revenues? Peddling has from time immemorial been regarded as a subject justifying the exercise of the police power by regulating acts, and I entertain no doubt that such was the aim and object of the legislature when it amended, as it did in 1901, the act theretofore existing which related to the same subject. An instructive and interesting opinion on the point now being considered, and under a statute of the same character as ours, is found in *Morrill v. State*, 38 Wis., 428. It is there held: "Laws restricting the business of hawkers and peddlers, or providing for the licensing thereof, are an exercise of the police power of the state, and do not lose this character by requiring payment of the license fees into the state treasury." It is observed by Lyon, J., who wrote the opinion of the court: "The statute was doubtless enacted in the interest of merchants having fixed places of trade, on the theory that a sound public policy demands

that these should be encouraged, and traveling merchants or peddlers discouraged; and for the further purpose of protecting honest and well disposed citizens from the arts and importunities, and frequently from the dishonest practices, of a class of traders to whom they are usually strangers, and who are not as directly amenable to those legal and social restraints which must necessarily greatly influence the business conduct of a merchant having a fixed place of business, and depending for his patronage upon one and the same community." And further on: "The reasons (or at least some of them) why the legislature enacted the law of 1870, have already been stated. That they are stated correctly, and that the common law regarded hawkers and peddlers with disfavor, and their vocation opposed in some degree to public policy, will appear by reference to Jacobs' Law Dictionary." After quoting from the authorities it is further stated: "We give the language of the author merely to show the grounds upon which, centuries ago, parliament regulated and restricted the business, and that such regulation and restriction is an exercise of police power in the interest of the public. But with this disclaimer we must be permitted to add that, undoubtedly, resort is often had to this business for the sole purpose of obtaining admittance (which could not otherwise be obtained) into private dwelling houses in furtherance of some criminal or unlawful object. This is another reason why the restriction or regulation of the business is an exercise of police power." The act under consideration in the case at bar, in my judgment, must be justified and upheld as an exercise of the police power. It is presumed to be constitutional and valid, and all intendment is to be taken in favor of the validity of the act, and the exercise of lawful powers by the legislature in its enactment. Whether it will, when thoroughly considered, square with all the express provisions of the fundamental law, I can express no opinion until a full investigation is made of the subject when it is considered in the light of an act of regulation. It would be a vain and useless

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effort for me alone to undertake the determination of that question; hence I must content myself with dissenting from the views of my associates in upholding the law as a valid exercise of the taxing power, and in overruling the several prior decisions mentioned in order to reach that conclusion.

W. E. GERRARD V. STATE OF NEBRASKA.

FILED APRIL 2, 1902. No. 12,476.

Occupation Tax: PEDDLERS: REVENUE LAW. The provisions of the general revenue law imposing an occupation tax upon peddlers were enacted by the legislature in the exercise of its taxing power and are valid.

ERROR from the district court for Hall county. Tried below before THOMPSON, J. *Affirmed.* HOLCOMB, J., dissenting.

O. M. Quackenbush and *W. A. Prince*, for plaintiff in error.

Frank N. Prout, Attorney General, *Norris Brown*, Deputy, and *R. R. Horth*, for the state.

SULLIVAN, C. J.

W. E. Gerrard, having been convicted in the district court of Hall county of peddling without a license, brings the record of his conviction to this court for review. All the questions discussed by counsel have been decided in *Rosenbloom v. State*, 64 Nebr., 342, in which we held that the provisions of the general revenue law imposing an occupation tax upon peddlers were enacted by the legislature in the exercise of its taxing power and are valid. This case is ruled by the *Rosenbloom Case*.

The judgment is

AFFIRMED.

HOLCOMB, J., dissents.

FRED MORGAN V. STATE OF NEBRASKA.

FILED APRIL 2, 1902. Nos. 12,478 and 12,479.

1. **License:** BILLIARD AND POOL: VILLAGE: ORDINANCE. Under the provisions of section 46, and subdivision 12 of section 69, article 1, chapter 14, Compiled Statutes, 1901, village authorities have ample power by ordinance to license and regulate billiard and pool rooms.
2. ———: ———: LICENSE TAX. And by subdivision 8 of section 69, aforesaid, village trustees are authorized to raise general revenue by levying and collecting a license tax on persons engaged in the business of conducting billiard and pool rooms.
3. **Ordinance:** TITLE. An ordinance whose main object is to license and regulate a business or calling is not wholly void because a provision imposing a small occupation tax is not clearly expressed in its title, as required by section 79 of article 1, chapter 14, Compiled Statutes, 1901.

ERROR from the district court for Otoe county. Tried below before JESSEN, J. *Affirmed.*

D. W. Livingston, for plaintiff in error.

Corydon Rood, for the state.

SULLIVAN, C. J.

These cases were submitted together on the same briefs, and will be disposed of in one opinion. In each case the defendant, Morgan, was convicted of violating a village ordinance, which was clearly intended to regulate and tax the business of keeping a pool and billard room. Under the stipulation of the parties, the validity of the ordinance is the only question properly before us for decision. The first contention of the defendant is that the village authorities in the adoption of the ordinance, attempted to exercise a power which the legislature had not conferred upon them. This contention can not be sustained. The power exercised by the board of trustees is, we think, fairly within the provisions of section 46, and subdivision 12 of section 69, article 1, chapter 14, Compiled Statutes, 1901.

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The interests of peace, good order and public morality require that the billiard and pool room should be conducted according to such rules and standards, and subject to such restrictions, as may be prescribed by the municipal authorities. Such a room is not, we concede, *per se* a nuisance, but without regulation and supervision it is likely to become so anywhere, and in a village it is apt to degenerate into a trysting-place for idlers and a nidus for vice.

But it is insisted that, if the ordinance was an authorized exercise of the police power, the provision imposing an occupation tax, in addition to the license fee, is invalid. Without conceding this proposition, which, on account of the restrictive title of the ordinance, is not free from doubt, we dispose of it by holding that, under the rule established by numerous decisions of this court, the taxing clause may be stricken out without destroying, or affecting in any way, the regulative provisions of the ordinance. *Scott v. Flowers*, 61 Nebr., 620; *State v. Stuhrt*, 52 Nebr., 209. See, also, *East Kingston v. Towle*, 48 N. H., 57; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill., 361; *McPherson v. Blacker*, 92 Mich., 377; *Grimes v. Eddy*, 126 Mo., 168.

The judgment in each case is

AFFIRMED.

HIRAM C. WELLS, APPELLEE, v. W. W. FRAZIER ET AL., IM-
PLEADED WITH MARION S. ALLEN ET AL., APPELLANTS.

FILED APRIL 2, 1902. No. 11,571.

1. **Judicial Sale: APPRAISAL.** An objection to an appraisal of real estate for the purpose of a judicial sale, to be available, must be made and filed before a sale thereof is had.
2. ———: ———: **AUTHORITY OF DEPUTY SHERIFF.** A deputy sheriff may act for and in the place of the sheriff in making an appraisal of real estate for the purpose of a judicial sale in the execution of a decree of court.
3. ———: ———: **OWNERS OF EQUITY OF REDEMPTION: DESIGNATION OF "ET AL."** An appraisal of the interests, in land about to be sold at judicial sale, of the parties to an action, against whom the decree operates, is not invalidated because the names of the

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owners of the equity of redemption are not stated other than by the designation "et al." after the name of the principal defendant in the action.

APPEAL from the district court for Custer county.
Heard below before SULLIVAN, J. *Affirmed.*

J. R. Dean, for appellant:

Talbot & Allen and Alpha Morgan, contra.

HOLCOMB, J.

We will consider only the objections to confirmation of sale of real estate to which our attention is called in the brief of counsel for appellants.

The objection that the appraisal of the land was for an inadequate sum comes too late, since it was not made until after sale, and just before an order of confirmation was asked for.

As to the second objection, we have held several times that a deputy sheriff may act for the sheriff in making an appraisement of land for the purpose of a judicial sale in the execution of a decree of foreclosure of a real estate mortgage. *Richardson v. Hahn*, 63 Nebr., 294, and authorities there cited.

It is next urged that because in the appraisal and advertisement of sale the parties are designated as Hiram C. Wells v. William W. Frazier et al., and the appraisal was of the interest of William W. Frazier et al., without naming the defendants who appeal, and who were the owners of the equity of redemption, this renders the proceedings so irregular as to amount to prejudicial error. The parties were designated with sufficient certainty to show the nature of the proceedings and the action in which the decree of foreclosure and order of sale were entered. The appraisement found the gross value of the lands from which was deducted prior incumbrances, the net appraised value being found as the value of the interest of all the defendants in the property. This certainly would include the

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owners of the equity of redemption, who were made parties to the action. We know of no legal ground of complaint because they were not specially singled out from the numerous defendants, and found to have an interest in the land as owners. It is obvious that they were in no way prejudiced by the appraisers not undertaking to ascertain and separate the interests of the different defendants against whom the decree operated. It is not required of the appraisers that they should ascertain and determine what the respective interests of the different defendants were in the land being appraised for sale. By finding the gross value of the land, and deducting therefrom the prior incumbrances, the value remaining represented the value of the interest, for the purpose of the sale, of either or all of those against whom the decree and its execution operated. *Toscan v. Devries*, 57 Nebr., 276. The object of the statute requiring the appraisal before sale is to fix the value of the real estate, below two-thirds of which the land can not be sold. It is for the protection of those whose interests therein are to be divested by the sale, and the object of the statute is accomplished by finding the net value of the land. We can conceive of no valid reason for holding that the objecting defendants were prejudiced because they were not named personally and specifically in the appraisal, and consequently the failure to so designate them is no sufficient ground for denying confirmation of sale.

The order appealed from is accordingly

AFFIRMED.

JOSHUA PALMER ET AL. V. JAMES S. CAYWOOD.

FILED APRIL 2, 1902. No. 11,573.

1. **Petition: DEMURRER: ANSWER: LEAVE OF COURT: WAIVER OF ERROR.**
Where a demurrer to a petition is overruled, and an answer, under leave given by the court, is filed, the error in overruling the demurrer, if any there be, is thereby waived.
2. **Supersedeas Undertaking: SUIT: CONDITION PRECEDENT: RETURN NULLA BONA: CODE.** It is not required that an execution be issued, and returned *nulla bona*, as a condition precedent to

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maintaining a suit on a supersedeas undertaking executed and delivered under the provisions of section 588 of the Code of Civil Procedure.

3. **Judgment: PROPERTY OF DEBTOR: CONDITION PRECEDENT.** Nor is it required that the judgment creditor shall, on affirmance of the judgment, exhaust the property of the judgment debtor, before bringing suit on the bond given to operate as a supersedeas pending the review of the proceedings resulting in the judgment by the appellate court.
4. **Suit on Supersedeas Bond: JUDGMENT DEBTOR: DEATH PENDING REVIEW.** Nor, where the judgment debtor has died pending such review, can the judgment creditor be required to look to the estate of the deceased, although solvent, for satisfaction of the judgment, before maintaining a suit on the supersedeas bond.
5. **Issue: TRIAL: POSTPONEMENT: MATTER OF RIGHT.** When the issues in an action are regularly made up, the cause stands for trial; and a party thereto will not be granted, as a matter of right, a postponement solely on the ground that the issues as made by the pleadings were formed sooner than he anticipated they would be.

ERROR from the district court for Saline county. Tried below before STUBBS, J. *Affirmed.*

Joshua Palmer, for plaintiffs in error.

J. D. Pope, *contra.*

HOLCOMB, J.

The plaintiff below, defendant in error, instituted an action in the district court for Saline county against the defendants, plaintiffs in error, on their liability as sureties on an undertaking executed in favor of plaintiff's assignor, who had obtained a money judgment against the principal in the undertaking, which it was sought to have reviewed on error in the supreme court, the undertaking being executed under and by virtue of the provisions of section 588 of the Code of Civil Procedure, for the purpose of staying the execution of the judgment pending the error proceeding prosecuted to obtain a reversal thereof. The petition is in the ordinary form, and, in substance, alleges the

recovery of the judgment superseded by the undertaking sued on; the execution, delivery and approval of the supersedeas bond; the removal of the cause to the supreme court on error, and the affirmance therein of the judgment recovered in the lower court; the issuance and filing in the district court of the mandate of the supreme court directing the enforcement of the judgment as affirmed; the assignment of the judgment to the plaintiff in the action, and that no part of the judgment, or the costs adjudged against him, had been paid by the judgment debtor, his heirs or assigns, or any other person, nor by the said defendants, who were signers of the supersedeas bond; followed by a statement of the amount due, and prayer for judgment. A demurrer was interposed, which, on consideration, was overruled, and leave given to answer, which was done. We are asked to review the ruling of the trial court on the demurrer, but that seems unnecessary, in view of the defendants' action in answering to the petition, and thus waiving the error, if any there be, in the ruling on the demurrer. *Buck v. Reed*, 27 Nebr., 67. The answer admitted the main facts alleged in the petition, and as a defense, pleaded that, pending the review of the cause in which the supersedeas bond was given in the supreme court, the judgment debtor died seized of personal and real property ample to pay all his debts, and that such judgment had been allowed as a proper claim against the estate of the deceased; that the order of allowance was in full force, and said judgment was a valid claim against the estate, which was amply sufficient for its payment. It is also alleged that the plaintiff had, after the death of the judgment debtor, intermarried with the widow of the deceased, and that the plaintiff, conspiring with the assignor of the judgment, obtained an assignment thereof for the fraudulent purpose of exempting the estate of the judgment debtor from the payment of the judgment, and to enforce collection of the same from the defendants, as sureties on the supersedeas bond, in violation of their rights. The portion of the answer relating to the filing of

the judgment as a claim against the estate, and its ability to pay the obligation, was, on motion, stricken from the answer, after which a reply consisting of a general denial was filed; and on the issues thus raised the action proceeded to trial and a judgment adverse to the defendants, from which they bring the cause here for review by proceeding in error.

The only question presented by counsel for the sureties relates to the action by the trial court in striking from the answer that portion thereof heretofore referred to, and its refusal to permit the introduction of any evidence tending to prove that the estate was solvent, and to show the ability of the plaintiff to obtain satisfaction of his judgment therefrom, and without recourse to the sureties on the supersedeas bond. Counsel say: "The position that we take is that under ordinary circumstances the creditor can elect whether he will pursue the debtor or his bondsmen, but where the creditor died during the litigation of the subject-matter, and the judgment having been allowed by the county court as a claim against the debtor's estate, and when said estate is solvent, he must pursue the same course as other creditors, and get his claim from the estate, and not be allowed to pursue and distress the securities on debtor's bond." The rule is, as we understand the authorities, that the sureties' liability on the affirmation of the judgment is absolute and unconditional,—as much so as the principal debtors,—and that the judgment creditor can not, unless, perhaps, in very exceptional cases, be required to exhaust the property of the principal on the undertaking before he is entitled to have recourse against the sureties, and collect from them what is due under the terms of the instrument. The sureties have obligated themselves unconditionally to "pay the condemnation money and costs in case said judgment shall be affirmed in whole or in part." This obligation can only be discharged by the satisfaction of the judgment, when affirmed in the appellate court, by the sureties, in the event of the failure of the principal so to do. It has been frequently held by this court that an

execution is not required to be issued, and returned *nulla bona*, as a condition precedent to maintaining a suit on the undertaking. *Cortelyou v. McCarthy*, 53 Nebr., 479; *Flannagan v. Cleveland*, 44 Nebr., 58; *Ayres v. Duggan*, 57 Nebr., 750; *Anderson v. Sloan*, 1 Colo., 484. If it is unnecessary to issue an execution against the judgment debtor, it would seem, *a fortiori*, that the judgment creditor could not be required to await the delays necessary and incident to the administration of the decedent's estate before realizing on the supersedeas bond, conditioned, as it is, for the immediate payment of the judgment on its affirmance by the supreme court. *Bingham v. Mears*, 27 L. R. A. [N. Dak.], 257; *Davis v. Patrick*, 57 Fed. Rep., 909. In the last case cited it is said: "In the case heretofore cited [*Babbitt v. Finn*, 101 U. S., 7] it was held, as before stated, that a surety in an appeal bond is not entitled to have an execution issued against the principal debtor, before suit is brought on the bond; that by the affirmance of the judgment the sureties became liable to the same extent as the principal obligor; and the same ruling has been made elsewhere. *Tissot v. Darling*, 9 Cal., 278; *Murdock v. Brooks*, 38 Cal., 596, 603; *Anderson v. Sloan*, 1 Colo., 484; *Smith v. Ramsay*, 6 Serg. & R. [Pa.], 576. If it be true that the liability of the surety is so absolute that he is not entitled to insist on the issuance of an execution against the principal debtor, it can hardly be contended that the defendants below were entitled to have the suit on the bond stayed until the attached lands were sold, and that security exhausted. If the sureties desired to avail themselves of the attachment lien, it was their plain duty to pay the judgment debt, and by so doing become subrogated to whatever lien the judgment creditor had acquired on the lands in question." It is a rule of very general application in actions at law on undertakings of the character of the one under consideration that a surety must, in the first instance, meet his obligation, and can not legally cast the burden on the person to whom the obligation runs to undertake to secure satisfaction from

the principal debtor before he may legally proceed against the surety, but, on the contrary, he may, at his election, as soon as the breach occurs, proceed to the enforcement of his rights by the virtue of the undertaking, and the legal duty rests on the surety to satisfy the obligation for which he is bound, and because thereof he may be subrogated to the rights of the judgment creditor, and may in his own behalf proceed in his own way to secure reimbursement and satisfaction from the principal debtor, for whose compliance with the terms of the undertaking he has vouched and become sponsor. We know of no sound reason or any recognized rule making an exception in a case where the principal debtor has died, and, as to his liability, satisfaction must be obtained from his estate. If the estate was solvent, then, indeed, would it be no additional burden to require the sureties to satisfy the obligation, and in turn look to the estate for the enforcement of their rights as sureties, and the rights of the obligee, to which they are subrogated by the payment of the obligation. If the obligee can not be required to resort to the property of the principal debtor in the first instance, before looking to the sureties, we are unable to distinguish, on principle, why he must, when the principal debtor dies, look to his estate for satisfaction of the obligation, before having a right to proceed against the sureties. We are of the opinion the rights of the creditor are in nowise modified or changed by reason of the decease of the judgment debtor, and the sureties can not escape the obligation they assumed, or delay its enforcement, because of that fact. The defense sought to be interposed can not avail the sureties on the bond declared on in the case at bar, and the trial court did not err in its rulings in respect of the same.

There is also complaint because the trial court did not continue the cause at the time trial was had, on the defendant's application. It is insisted that because the motion to strike out a part of the answer was sustained, and the plaintiff replied instanter to the answer as it then stood, the cause should have been continued, because the issues

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were prematurely made up, and before the defendants were prepared for trial. No other reason is given for a postponement of the trial, and we know of no rule of practice that will give to a defendant, as a matter of right, a continuance of a cause on the ground that the issues, as made by the pleadings, were formed sooner than he anticipated they would be. The cause stands for trial as soon as the issues are formed, unless for some valid reason one of the parties is entitled to a postponement. We perceive no error in the record and the judgment therefore should be, and accordingly is,

AFFIRMED.

E. MOULTHAN ET AL., APPELLEES, V. FRED APKING ET AL.,
APPELLANTS.

FILED APRIL 2, 1902. No. 11,579.

1. **Confirmation of Sale: EVIDENCE.** Record examined, and *held* confirmation of sale of real estate was regularly and properly entered; *held* also the evidence is sufficient to sustain the ruling of the trial court on objections to appraisal and confirmation of sale.
2. **Certificate of Incumbrance: REVENUE STAMP.** The certificates of prior incumbrances and appraisal of land for the purpose of sale in foreclosure proceedings are not required to be stamped, under the provisions of the war revenue act of 1898. *Noble v. Citizens' Bank of Geneva*, 63 Nebr., 847, followed.
3. **Brief: RECORD: QUESTION PRESENTED.** Questions discussed in briefs which are not properly presented by the record will not be considered.

APPEAL from the district court for Fillmore county.
Heard below before STUBBS, J. *Affirmed.*

J. H. Stirling, for appellants.

F. B. Donisthorpe and *Charles H. Sloan*, *Frank W. Sloan* and *Robert J. Sloan*, *contra.*

HOLCOMB, J.

Appellants, who were defendants below in a suit for the foreclosure of a real estate mortgage, objected to the ap-

praisement of the land made for the purpose of a sale in satisfaction of the decree and in pursuance of the order of court, and also to the confirmation of the sale thereafter made, on the ground that the appraisement so made was so much below the real value as to be in fraud of the rights of the appellants, who were the owners of the equity of redemption. The land was appraised at the gross sum of \$2,500. Three affidavits on behalf of appellants were filed in support of their objections, in which the land was estimated by the parties making the affidavits to be of the value of \$2,800. The appellants filed their own affidavits, fixing the value at \$4,400. But in view of their interest in the subject-matter in litigation and the highly inflated valuation placed on the land as compared with all others testifying regarding the question, as well as the evidence of value as fixed by the appraisers, these affidavits were very probably considered as of little value by the trial court in determining the matter then under consideration. No very great difference appearing between the affidavits of the others in support of the objection and the valuation as fixed by the three appraisers, and the court in passing on the question having refused to set aside the appraisal as being so grossly low and inadequate as to be presumptively fraudulent, we can not say such action is unsupported by the evidence. No actual fraud is charged, nor is any attempt made to prove that such was the case. The evidence was fairly conflicting, and we think supports the conclusion reached. Error can not, therefore, be predicated on the ruling in that regard. *Nebraska Loan & Building Ass'n v. Marshall*, 51 Nebr., 534.

It is also contended that, because no revenue stamps were attached to the certificates of incumbrances and the appraisal of the land as made by the sheriff and two others called for that purpose, no competent evidence existed showing the same to have been made, and for that reason the trial court could not rightfully enter an order confirming the sale. Such certificates are not required to be stamped, under the provisions of the war revenue act of 1898. *Noble v. Citizens' Bank of Geneva*, 63 Nebr., 847.

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The objection last mentioned, for the reason stated, is untenable. Other questions are discussed which are not properly presented by the record before us, and will not, for that reason, be further noticed.

We find nothing in the record to warrant us in concluding otherwise than that the order appealed from was properly and regularly entered, and should therefore be affirmed, which is accordingly done.

AFFIRMED.

JACOB PECHA ET AL. V. JACOB KASTL.

FILED APRIL 2, 1902. No. 11,209.

Commissioner's opinion, Department No. 1.

1. **Pleading:** DENIAL: JUDGMENT. Denial of "each and every allegation of new matter set up in defendant's answer," and of "each and every other part of same, except such allegations of said answer as may be admissions of plaintiff's petition," while subject to motion to strike or to make more specific, being neither a general or specific denial, is sufficient to prevent a judgment for defendant on the allegations of the answer.
2. **Evidence:** CONVERSION. Evidence examined, and *held* sufficient to support a finding for plaintiff in action against a joint-owner and the purchaser of a horse-power for conversion of it by a sale.
3. **Instruction:** CONVERSION: RIGHT OF POSSESSION. Not prejudicial error to leave out the element of plaintiff's right of possession, in defining "conversion," where that question, so far as the case on trial is concerned, is fairly submitted in another instruction.
4. ———: ———: ———. An instruction that, if conversion was found, both seller and purchaser of the property were liable, *held* not error, when the circumstances which would and would not make the sale a conversion had been fairly indicated.

ERROR from the district court for Butler county. Tried below before BATES, J. *Affirmed.*

Hastings & Hall, for plaintiffs in error.

Matt Miller, *contra.*

HASTINGS, C.

In this case the first complaint is of error in not sustaining a motion for judgment in favor of defendants on the

pleadings. The ground for such motion was the fact that the reply of plaintiff merely denied "each and every allegation of new matter set up in defendants' answer," and "each and every other part of same except such allegations of said answer as may be admissions of plaintiff's petition." Plaintiff's petition was for conversion of a horse-power. Plaintiff below, defendant in error here, alleges that on January 28, 1899, he was the owner of a horse-power jointly with plaintiff in error Pecha, and that the defendants Pecha and Ptacek converted it to their own use, and refused to restore it, to plaintiff's damage in the sum of \$40; that, in shelling his corn, plaintiff had been compelled to pay \$7 for the use of a sheller. Defendants deny these allegations, but admit that, some time before the date mentioned, plaintiff and Pecha owned a sheller and horse-power, and say that about January 28, 1899, a division of the property was agreed on, and Pecha was to have the horse-power, and plaintiff the sheller, and since that time plaintiff had no interest in the power. To this answer the reply above stated was filed. It does not seem necessary to say that the trial court was not in error in refusing to render judgment for defendants on the pleadings. The reply does not comply strictly with our statute. It is hardly a general or special denial, but it was not a nullity. It should have been required, on motion for that purpose, to have been made more specific or to have been stricken out, but while it remained in the record it was sufficient to prevent a judgment for defendants. *Herdman v. Marshall*, 17 Nebr., 252; *Miller v. Brumbaugh*, 7 Kan., 343; *Collins v. Trotter*, 81 Mo., 275.

It is claimed that the evidence is insufficient to sustain the verdict for plaintiff in the sum of \$10. The evidence is somewhat conflicting as to plaintiff's assent to the taking and appropriation of the power, but the preponderance seems clearly in favor of the jury's view that there was no settlement, nor agreement to divide the property, and that the power was taken by defendant Pecha and sold without the assent of his co-owner.

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The giving of instructions Nos. 4, 7 and 9 is assigned as error. The first of these is, "The burden of proof is upon the defendant Pecha to prove the material allegations of his answer by a preponderance of the evidence." It is complained that no indication as to what were the material allegations of the answer was given to the jury. It is conceded that no instructions covering this point were asked. The abstract correctness of the instruction given is not disputed. If a more definite instruction was desired, it should have been asked. It does not appear that the jury was misled in this matter. Instruction No. 7 told the jury that the wrongful taking of the property, and appropriating the same to the party's own use, constituted conversion. It is complained that this took from the jury the issue as to the division of the property by agreement, and that it permitted a recovery by plaintiff on the weakness of defendants' title, and not simply on the strength of his own. The instructions must be taken together, and by the eighth instruction the jury were expressly told that consent by plaintiff to the taking and sale of property by Pecha would defeat his action, and also that an agreement for a division would have the same effect. The failure to call attention in the seventh instruction to the necessity that plaintiff have at least an immediate right of possession in the property seems to be amply cured in this eighth one.

The court having defined "conversion" as a wrongful taking, and having stated what circumstances would and would not make the admitted action of defendant in selling the property wrongful, it was not error to tell the jury, by the ninth instruction, that, if they found that defendant Pecha had converted the property and sold it to his codefendant, both were liable.

It is recommended that the judgment of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated above, the judgment of the district court is

AFFIRMED.

C. G. SOMERS ET AL. V. JOSEPH VLAZNEY.

FILED APRIL 2, 1902. No. 11,255.

Commissioner's opinion, Department No. 1.

1. **Liquor-License: PETITION.** Under section 25 of chapter 50, Compiled Statutes, a petition for a license to sell malt, spirituous and vinous liquors is sufficient if signed by thirty resident freeholders of the ward or village where the sale of such liquors is to take place, and, in case there are less than sixty resident freeholders in such ward or village, the petition is sufficient if signed by a majority of the resident freeholders of such ward or village.
2. **Intoxicating Liquor: LICENSE: REMONSTRANCE.** Under section 3, chapter 50, Compiled Statutes, the right to protest or remonstrate against the issuance of a license is not confined to residents of the ward or village where the intoxicating liquors are sought to be sold.
3. **Evidence.** Evidence examined, and *held* to support the judgment.

ERROR from the district court for Madison county. Tried below before ALLEN, J. *Affirmed.*

William M. Robertson and George L. Whitham, for plaintiffs in error.

John B. Barnes, contra.

DAY, C.

On April 11, 1899, Joseph Vlazney filed with the clerk of the city of Norfolk a petition in the usual form, praying for a license to sell malt, spirituous and vinous liquors in the first ward of said city. The usual notice of his application was duly published as required by law. Before the hearing upon the application, C. G. Somers and G. L. Whitham filed a protest or remonstrance with the city counsel against the issuing of the license, alleging, among other reasons, that the names of thirty resident freeholders of the ward were not signed to the petition; that during the previous year the applicant had a license to sell liquors, and during said year had violated the provisions of chapter

50 of the Compiled Statutes by selling intoxicating liquors to minors, and by keeping screens and blinds upon the windows and doors of said place of business and so obstructing the public gaze. At the hearing before the council the remonstrance was overruled, and a license was ordered issued as prayed. The remonstrators prosecuted an appeal from the decision of the council to the district court, where, upon hearing, the action of the council was sustained. To review the judgment of the district court the remonstrators have brought the case to this court by proceeding in error.

The evidence shows there were thirty-three resident freeholders in the first ward of said city at the time the petition and bond were filed and the notice of the application given. The petition was signed by twenty-three persons, nineteen of whom were resident freeholders in the ward and qualified to sign the petition. Section 25 of chapter 50 of the Compiled Statutes of Nebraska provides that "in granting any license the petition therefor shall be sufficient if signed by thirty of the resident freeholders, or if there are less than sixty, a majority of the freeholders of the ward or village where the sale of such liquors is to take place." The evidence showed that there were but thirty-three resident freeholders in the ward, nineteen of whom signed the petition. This was a majority and a compliance with the statute. The objection urged upon the ground that the petition did not have thirty signers is not well taken.

The district court held that remonstrators, being non-residents of the first ward, had no interest therein entitling them to remonstrate against the issuance of the license, and that, therefore, the case stood precisely as it would had no remonstrance been filed. In so holding we think the court erred. Section 3 of chapter 50 of the Compiled Statutes of Nebraska provides: "If there be any objection, protest, or remonstrance filed in the office where the application is made against the issuance of said license, the county board shall appoint a day for the hearing of said case, and if it shall be satisfactorily proven

that the applicant for license has been guilty of the violation of any of the provisions of this act within the space of one year, or if any former license shall have been revoked for any misdemeanor against the laws of this state, then the board shall refuse to issue such license." The policy of the law regulating the sale of intoxicating liquors is to place the sale of such liquors in the hands of peaceable, law-abiding persons, and with that in view requires the applicant to be "a man of respectable character and standing and a resident of this state." The publication of the notice is for the very purpose of giving the fact of the application publicity, to the end that any person who has a good reason to protest against the issuance of the license may remonstrate if he desires to do so. The statute does not confine the right to protest to the residents of the ward where the intoxicating liquors are sought to be sold. A fair construction of its provisions gives the right to protest to any one who desires to remonstrate.

One of the reasons urged by the remonstrators against the license was the claim that two of the members of the council had signed the petition for the license. The proof, however, showed that while Councilman Uhl had signed his name to the petition it had been by his direction stricken off before the hearing, and, besides, he did not vote upon the question of granting the license when that question was passed upon by the council. Objections urged against Brummond on the ground that he had signed the petition were not sustained, it being shown that it was his wife's and not his name attached to the petition.

Another reason urged by the remonstrators against the license was that the applicant had, during the previous year, sold intoxicating liquors to minors, in violation of the law. It was shown that he was convicted of such an offense before the police court, but the applicant showed that the case had been properly appealed to the district court, and was then pending and undetermined. There was therefore no competent evidence of his previous viola-

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tion of the law with respect to the matter charged. It was shown there was a screen standing from six to ten feet from the entrance of the door to the room, but it is not shown that the vision of any one desiring to look into the building was successfully obstructed, or that there was any intention on the part of the applicant to obstruct the public gaze.

While we do not agree with the reasons upon which the court based its judgment, we think the judgment was right. The error was without prejudice. We therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

HENRY I. CLARY, APPELLANT, v. McLANE WATKINS, SR.,
ET AL., APPELLEES.

FILED APRIL 2, 1902. No. 11,529.

Commissioner's opinion, Department No. 1.

1. Descent: UNCLE: AUNT: COUSIN: SECOND COUSIN. G. died intestate, leaving surviving her neither issue nor husband, father, mother, brother, sister, nephew, niece, grandfather, grandmother or grandchildren; her nearest relatives being two uncles and an aunt, cousins and second cousins. *Held* that, under our statute of descent, the two uncles and the aunt took the entire estate, to the exclusion of cousins and second cousins.

—: INHERITANCE PER STIRPES. It is the object of our statute to cut off inheritance *per stirpes* among collaterals where at any point beyond the children of brothers and sisters the surviving kindred are of unequal degrees. In such case those nearest in degree take the estate, to the exclusion of those more remote. *Douglas v. Cameron*, 47 Nebr., 358, followed.

APPEAL from the district court for Nemaha county.
Heard below before STULL, J. *Affirmed*.

A. L. Knabe, for appellant.

William H. Kelligar and Edgar Ferneau, contra.

DAY, C.

The facts necessary to an understanding of the question presented by this appeal are substantially as follows: On August 21, 1898, Mary E. Gooseman, a resident of Nemaha county, Nebraska, died intestate, seized in fee of a large amount of real estate situated in said county, a specific description of which seems unnecessary to be set out. She left surviving her neither issue nor husband, father, mother, brother, sister, niece, nephew, grandfather, grandmother or grandchildren; her nearest relatives being uncles, an aunt, cousins and second cousins. There were surviving her two uncles, who were brothers of her mother, to wit, Thomas Watkins and McLane Watkins, Sr., and an aunt, Naoma Whittle, who was a sister of her father, and numerous cousins and second cousins who were the lineal descendants of deceased uncles and aunts of the intestate. One of the cousins, Henry L. Clary, brought this action for partition in the district court of Nemaha county. The uncle, McLane Watkins, Sr., and the children of Thomas Watkins, the latter having died since the death of his sister, Mary E. Gooseman, and the aunt, Naoma Whittle, each filed answers denying any rights of the plaintiff in and to the lands, or any part thereof, and each also filed cross-petitions averring that the estate went to the two uncles and aunt, to the exclusion of the cousins and second cousins. Upon a hearing the court decreed the lands to the uncle, McLane Watkins, Sr., and to the children of Thomas Watkins, the deceased uncle, and to Naoma Whittle, to the exclusion of cousins and second cousins. To review this judgment the plaintiff has brought this case to this court by appeal.

The appellant claims that the rule of descent should be governed by subdivision 3, section 30, of chapter 23 of the Compiled Statutes, which is as follows: "Third. If he

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shall have no issue, nor widow, nor father, his estate shall descend in equal shares to his brothers and sisters, and to the children of any deceased brother or sister, by right of representation; *Provided*, That if he shall have a mother also, she shall take an equal share with his brothers and sisters." The appellees claim that the case falls within the provision of subdivision 5 of said section, which is as follows: "Fifth. If the intestate shall leave no issue, nor widow, and no father, mother, brother, nor sister, his estate shall descend to his next of kin, in equal degree, excepting that when there are two or more collateral kindred in equal degree but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor more remote."

The precise question here presented has been determined by this court in the case of *Douglas v. Cameron*, 47 Nebr., 358, where the rules of descent under the provisions of section 30, chapter 23, of the Compiled Statutes are considered and construed. In that case the intestate left surviving him neither issue nor father, mother, brother or sister. There were surviving him four children of a deceased brother, eight children of a deceased sister, and three children of a deceased daughter of such sister. The court held that the case fell within the fifth subdivision of section 30, chapter 23, and not within the third subdivision; that the twelve surviving nephews and nieces took the land to the exclusion of the grandnephews and grandnieces. In the syllabus it is said: "It is the object of our statute to cut off inheritance *per stirpes* among collaterals where at any point beyond the children of brothers and sisters the surviving kindred are of unequal degrees. In such case those nearest in degree take the estate to the exclusion of those more remote."

The judgment of the lower court is in strict conformity to the rule announced in *Douglas v. Cameron*, *supra*. We are satisfied with the construction of our statute as announced in that case.

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We therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

GEORGE C. CLOSE, REVIVED IN THE NAME OF CARRIE ROCKWELL, APPELLANT, V. SURN SWANSON ET AL., APPELLEES.

FILED APRIL 2, 1902. No. 10,154.

Commissioner's opinion, Department No. 1.

1. **Highway:** ORDER OF COUNTY BOARD: DEDICATION: USER. Where no order has been made by a county board laying out or establishing a traveled road, the public has no rights in such road as against a landowner in adverse possession, except such as are acquired by dedication and user. *Lydick v. State*, 61 Nebr., 309, distinguished.
2. ———: DEDICATION. To constitute a valid dedication of private property for a public highway, it must clearly appear that the owner intended to dedicate the land for a highway, and that the public by user or otherwise accepted the land for that purpose.
3. **Evidence:** FINDINGS. Evidence examined, and *held* not to sustain findings and decree of trial court.

APPEAL from the district court for Burt county.
Heard below before FAWCETT, J. *Reversed.*

H. E. Carter, for appellant.

Willis G. Sears and *H. H. Bowes*, *contra.*

KIRKPATRICK, C.

This is a suit brought by George C. Close, appellant, as the owner of the east half of the northeast quarter of section 1, township 21 north, range 10 east, in Burt county, against Surn Swanson, road overseer of district No. 12, and against Horace Brookings, road overseer of road district No. 27, both of Burt county, appellees. Separate petitions were filed against the appellees, but by consent of

all parties, an order of consolidation was made, and the two cases tried as one. The petitions are identical, and plead that appellant purchased the land in question in 1867, and soon thereafter moved upon it, and that he has resided thereon ever since; that he has valuable buildings and improvements on the land, and that he has, at great expense and labor, set out a valuable grove and hedge and ornamental trees, along the north line of his land; that he has the land inclosed by a substantial fence, placed immediately north of his grove, etc.; that immediately north of his fence there is a traveled road, which has been used by the public for such purpose for more than ten years; that said road was never laid out or established; that all rights of the public therein have been obtained solely by user; that the centre line of said road is the line dividing road district No. 27, lying on the south, of which Horace Brookings is the road overseer, and that portion of the road lying north of the centre line which is road district No. 12, of which Surn Swanson is the road overseer; that appellees, Swanson and Brookings, threaten and intend to cut down appellant's hedge, and tear down and remove his fence, and cut down his grove and ornamental trees, all within a strip of land about two rods in width within the line of his fence on the north of his premises; concluding with a prayer for a permanent injunction. The answer of the appellees admitted their official capacity, and alleged that the road was duly laid out and established, and that the fence and trees of appellant Close obstructed the public road; that he had been notified to remove his fence and cut down the hedge and timber, but that he had failed and refused to do so; concluding with a prayer that a decree be entered decreeing the existence of a sufficient, proper and legal public road over said premises, and that defendants, as road overseers, have the right to exercise lawful authority with relation thereto, and that the temporary injunction theretofore granted be dissolved, and for costs. To these answers a general denial was filed by appellant, and a trial was had, which resulted

in a judgment dismissing appellant's petitions at his cost, and vacating the temporary injunction theretofore granted. From this judgment the case is brought to this court by appeal.

A great amount of evidence was taken in the case, in which there appears little, if any, dispute, and the matters following may be said to be established beyond question. In 1867 appellant purchased the land in controversy, and in about a year thereafter established his residence thereon. At that time many of the corner stones and monuments placed by the government surveyors were in a good state of preservation. The quarter corner on the north side of section 1 was marked by a stone no doubt selected and marked by the government surveyors. The government corner at the northeast of section 1 was plain, and never has been questioned. There seems to be no question that the quarter corner on the north side of section 1 stood three or four rods north of a true east and west line. But however that may be, it is claimed by appellant as the true corner, is the only one claimed ever to have been found, and was recognized by the landowners on both sides of the line, as well as the general public, for twenty-five or thirty years, and up until the commencement of this controversy. In 1876 a petition was presented to the county board, asking for the establishment of a public road along this section line. It was signed by appellant, among others, and the road appears to have been viewed or surveyed. These were preliminary steps to be taken to authorize the county board to act, and for its information, that it might properly and understandingly act. No other steps were ever taken, and no order was made or attempted by the board laying out or establishing the road in question.

In the case of *Lydick v. State*, 61 Nebr., 309, this court said: "Where a public road has been established by proceedings under the statute, and opened and traveled by the public for more than ten years, the public thereby acquires an easement therein; and the court will not examine

the original proceedings for the laying out of the road, and determine whether or not they were valid." Of the correctness of the rule established by that case, and the decisions cited in support thereof, we have no doubt; but in the case at bar the county board stopped short of making any order concerning, laying out, or establishing the road in question. Hence the road involved in this controversy does not come within the rule announced in that case. If an order, however irregular, had been made by the county board, laying out or establishing the road in controversy, the rule in *Lydick v. State, supra*, would govern. At the time the petition for the road was signed, appellant gave two rods of his land along the north line for road purposes, and removed his fence, which he then had on a portion of his north line, south thirty-three feet from the line claimed by him to mark his north boundary, to the place where it now stands. He plowed a furrow east and west along the line where his fence now stands, planted a hedge in the furrow, and built a fence, which he has maintained ever since. It was some little time before he completed this fence up to his northwest corner, and during a portion of the time the fence has been allowed to remain down and out of repair. But at no time from the year 1876 until the commencement of this suit did appellant permit any public travel south of the line of his fence and hedge. Long before the attempted establishment of the road mentioned, appellant had his north line surveyed by the county surveyor, who recognized the marked stone on the north side of section 1 as the true corner, and placed a stone for appellant's northwest corner on a true line between the quarter corner on the north side of section 1 and the northeast corner of that section; and this corner, so placed by the county surveyor, has always been maintained by appellant.

It is disclosed by the testimony that the parties owning the land north of the section line have during late years, as they from time to time repaired and rebuilt their fence, gradually moved it south near the quarter corner on the

north side of section 1, encroaching upon the traveled road, until at the commencement of this suit their fence was nearly three rods south of the point where the marked stone corner was located, thus nearly closing up the traveled road; and back of this case seems to lie the desire of appellees, as road overseers, and of the public, to straighten this piece of roadway, and to cut down appellant's fence, trees and hedge, in order to effectuate that purpose.

All of the above matters being clearly established by the evidence, the case seems to resolve itself into a question purely of law. The only right the public has in the use of the road extending along the north line of appellant's land is that obtained by dedication, the proceedings had for the purpose of laying out the road being wholly insufficient to confer any right upon the public to the use of the land as a highway. A fair definition of what constitutes dedication is found in 1 Bouvier, Law Dictionary [15th ed.], 492, as follows: "An appropriation of land to some public use, made by the owner, and accepted for such use by or on behalf of the public. Express dedication is made by deed. Implied dedication is presumed from an acquiescence in the public use. Without acceptance a dedication is incomplete." The rule seems to be abundantly supported by authority in this and other states that the owner of land must have an intention to dedicate, coupled with an actual abandonment of the use of the property exclusively to the public. The owner of the land must set it apart to the extent that he intends it to be appropriated; it must be given over to the public use. And the rule is equally well settled and sustained by authority that such dedication must be accepted by the public. In the case of *Brown v. Stein*, 38 Nebr., 596, this court said: "In order to establish the existence of a public highway over private property by dedication the *animus dedicandi* is essential and must be clearly proved." And again, in the case of *City of Omaha v. Hawver*, 49 Nebr., 1, it is said: "Where the acts of an owner of real estate are

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relied upon to prove that he has dedicated it to the public, the acts must be such as to clearly manifest an intention on his part to dedicate it; and the public must have so acted with reference to the property as to indicate an intention of acceptance of the property dedicated. Acts of an owner which amount to a dedication of his property to the public must be such as indicate an abandonment of the use of the property exclusively to the public." The following cases, among a great list of authorities cited, support the rule announced in this state: *Johnson v. City of Burlington*, 95 Ia., 197, 63 N. W. Rep., 694; *Brooks v. City of Topeka*, 8 Pac. Rep. [Kan.], 392; *Eastland v. Fogo*, 27 N. W. Rep. [Wis.], 159; *Bell v. City of Burlington*, 27 N. W. Rep. [Ia.], 245; *City of Alton v. Meeuwcnberg*, 66 N. W. Rep. [Mich.], 571.

In the case at bar, as we have seen, the undisputed evidence discloses that for more than twenty-five years appellant has occupied the land in controversy continuously, and has always had it enclosed within the fence now maintained by him; and during all this period it is equally clear that the public has used as a road only that portion of appellant's land north of his present line of fence and hedge. It follows, therefore, that the judgment of the trial court is wholly unsupported by the evidence.

It is recommended that the judgment of the trial court be reversed, and a decree entered herein that a perpetual injunction be granted as prayed for in appellant's petition.

HASTINGS and DAY, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and a decree will be entered in this court, granting a perpetual injunction as prayed for.

JUDGMENT ACCORDINGLY.

NOTE.—Highway—Dedication—United States Homestead—Fencing Land Leaving Strip Along Section Line. *Rube v. Sullivan*, 23 Nebr., 779.—REPORTER.

MARY MAYHEW V. ELIZABETH KNITTLE.

FILED APRIL 2, 1902. No. 11,254.

Commissioner's opinion Department No. 2.

1. **Assignment of Error: WAIVER.** Assignments in a petition in error, not argued in the brief of plaintiff in error, will be considered waived.
2. **Findings: EVIDENCE: BRIEF: ARGUMENT: WAIVER.** Where there are several findings, made by the trial court, which appear to be sustained by the evidence, each of which will sustain the decree and the plaintiff in error in his brief and argument in this court complains of but one of them, the decree will be affirmed without passing upon the findings complained of.

ERROR from the district court for Douglas county.
Tried below before DICKINSON, J.: *Affirmed.*

Lysle I. Abbott, for plaintiff in error.

Joel W. West, *contra.*

BARNES, C.

On the 11th day of June, 1897, the plaintiff herein commenced an action in the district court of Douglas county against the defendant, Elizabeth Knittle, to enforce the specific performance of a contract to convey certain real estate. The contract was entered into on the 20th day of July, 1891, and was alleged to be, in substance, as follows: That at the time it was entered into the defendant was the owner of the west thirty-three feet of lot 1, in block 92, original plat of Omaha; that one Lucien H. Spencer agreed to and with the defendant to build a brick block on the said lot, thirty-three feet front by sixty feet deep, and two stories high, the same to be built so that the median or middle line dividing the said building lengthwise should stand and be upon the middle line of the said lot; that the building should cost at least \$5,000, and should be built according to certain plans and specifications, which were made a part of the contract. It was further provided that

when the building was fully completed, and all of the payments due for the erection of the same were made in full, the defendant should convey, by warranty deed, the east half of said lot to said Lucien H. Spencer; that upon the conveyance of the real estate, as provided in the contract, an agreement should be made and entered into by and between the parties thereto, giving to each party the free and unobstructed use in perpetuity of the hall in the second story, and the stairway leading from the street to the second story, the water-closet on the first or main floor, and the store room and water-closet in the basement, which it was stated were so constructed that they were on both sides of the middle line of the building. It was provided that the contract should be binding upon and accrue to the use of the heirs, assigns, executors and administrators of the respective parties thereto. It was further set forth in the petition that Lucien H. Spencer duly and fully complied with the terms and provisions of the contract by erecting said building, and that it cost a sum exceeding \$5,000; that it was completed and the terms of the contract fully complied with by the said Lucien H. Spencer on or before the 3d day of January, 1892; that said Spencer went into the possession of his part of the building and remained in the possession thereof up to the time of his death; that he made a demand upon the defendant to execute a deed to him according to the terms of the contract, but that she refused, and has ever since refused, to make such deed. It was further alleged in the petition that soon after the completion of the contract on his part Spencer left the city of Omaha and remained away until the following June, at which time he returned, and on July 3, 1892, departed this life, leaving a will, by which he conveyed all of his property to the plaintiff (who was at that time his wife) and his sister, one Mrs. Harriet E. Smith. It was further alleged that the will had been probated and the estate settled, and that Harriet E. Smith had conveyed to the plaintiff all the interest that she had in and to the estate of the deceased. There was also a

claim made against the defendant for the rents and profits of the one-half of the building from the time of its completion to the date of the commencement of the suit. The petition concluded with a prayer for the specific performance of the contract, and an accounting for the rents and profits, and a judgment for the sum that should be found due the plaintiff. To this petition the defendant filed an answer setting forth the following defenses:

1. The defense of the statute of limitations.
2. Laches on the part of the plaintiff, together with facts incident thereto, showing the want of equity in the plaintiff's bill.
3. Gift of the property by Lucien H. Spencer during his life time to the defendant, and facts constituting a complete execution thereof.

4. A denial of all the facts stated in the petition, except those specifically admitted by the answer.

The reply was a general denial. A trial was had, and after the introduction of all of the evidence and arguments of counsel the court made the following findings:

"The court finds that there is no equity in the plaintiff's bill, and that the equities are in favor of the defendant as against the plaintiff.

"The court further finds that the defendant is the absolute owner in fee simple of the premises described in the plaintiff's petition, to wit: The west 33 feet of lot 1, in block 92, of the original plat of the city of Omaha, Douglas county, Nebraska, as surveyed, platted and recorded, and plaintiff has no right, title or interest therein by virtue of the contract set out in plaintiff's petition, nor in any other manner whatsoever.

"And the court further finds that plaintiff's cause of action is barred by the statute of limitations, and further that plaintiff was guilty of laches in commencing her suit on said contract."

And upon said findings the court made the following judgment:

"Wherefore, it is ordered, adjudged and decreed, that

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the plaintiff's bill be dismissed, and that plaintiff be forever barred from having or claiming to have any right, title or interest in or to said premises, or any part thereof, and that defendant's title in and to the same be and hereby is established and quieted as against any and all claims of the plaintiff, and that the defendant recover from the plaintiff her costs herein expended, taxed at \$—, to which plaintiff excepts."

The plaintiff filed a motion for a new trial, which was overruled, and she thereupon brought the case to this court upon a petition in error, which contained the following assignments:

"1. That the findings and judgment of the trial court are not sustained by sufficient evidence.

"2. That the findings and judgment of the district court are contrary to law.

"3. That the trial court erred upon the trial of said cause, and the proceedings connected therewith, in permitting the witness, J. W. West, to testify in regard to conversations with the deceased, Lucien H. Spencer, said conversations occurring before the execution of the contract sued upon in this case.

"4. The trial court erred in allowing the witness, Willie Knittle, son of the defendant, to testify concerning conversations with the deceased, Lucien H. Spencer, after the completion of the building erected by the said deceased upon the premises in controversy in this suit.

"5. The trial court erred in refusing to grant a new trial herein upon the grounds of newly-discovered evidence, as shown by the affidavit of John O. Yeiser, filed in said cause, which evidence the plaintiff was unable to discover and produce on the trial for the reason that she did not know of the existence of said evidence until after said cause had been tried.

"6. The court erred in overruling plaintiff's motion for a new trial."

1. The plaintiff, by her brief and argument of the case in this court, presents but one contention, which is that

the court erred in finding that the plaintiff's cause of action was barred by the statute of limitations. She will be deemed to have elected to stand upon this single assignment of error, and to have waived all the others. Assignments in a petition in error not argued in the brief will be considered waived. *Madsen v. State*, 44 Nebr., 631; *Scott v. Chope*, 33 Nebr., 41; *Gill v. Lydick*, 40 Nebr., 508; *Glaze v. Parcel*, 40 Nebr., 732.

2. It will be observed that the court made certain findings, other than the one complained of, which are sufficient to sustain the decree. The court found that there was no equity in the plaintiff's bill; that the defendant is the absolute owner in fee simple of the whole of the real estate described in the petition; and that plaintiff has no right, title or interest therein by virtue of the contract set out in her petition, nor in any other manner whatsoever; and that the plaintiff was guilty of laches in commencing her suit on the contract. In her brief and argument plaintiff does not challenge these findings. Under the well-established rules of this court it is not necessary to further examine the record in this case, but, in order to be sure that no injustice is done the plaintiff, we have carefully read the evidence and find that it clearly shows that at the time the contract was entered into, the deceased, Lucien H. Spencer, stated, in the presence of a third party, that he was not particular about the contract himself, because the defendant had formerly been his wife; that he had done her a great wrong and injustice by putting her away and obtaining a divorce from her. He also expressed much feeling over the matter, and stated that he had sold some property for a large amount of money,—something like \$18,000,—and that he intended to erect the building in question on the lot owned by the defendant for her, and give it to her in lieu of money, so as to provide a source of income for her and his son, Willie Knittle (sometimes called Eddie Spencer), who lived with her. It is further shown that, as soon as the building was completed, Spencer informed the defendant and his son of that fact; that on

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the 5th day of January, 1892, two days after its completion, the defendant and her son moved into the building, and took complete possession and absolute control of all of it; that Spencer gave the defendant all of the keys, and stated to her, in the presence of the son, that it was hers; that she could rent it or do whatever she pleased with it; that he was going to visit his homestead in Oklahoma; that he parted with the defendant and his son on friendly terms after making such statement, and on the 8th day of January started on his journey; that he returned in June, 1892, and died July 3, leaving the will mentioned in the petition, but that it contained no reference to, or description of, the property in question herein. It is further shown that the defendant has remained in the absolute control and possession of the whole property from the time that she moved into the building until the commencement of the action; that when deceased went to Oklahoma the only property he left in the building was in the basement, and was his surveying instruments, a safe, and a few tools; that he never made any claim to the property, and never demanded any deed therefor in his lifetime; that after the death of Spencer, the plaintiff and a constable or other officer went to the building, and got the things which she claimed belonged to him; that the plaintiff delayed commencing any suit to compel the specific performance of the contract for more than five years after the completion of the building; that during that time the defendant has paid all of the taxes assessed against the whole property, has had it painted at least twice, inside and out, has kept it in good repair, has paid special paving taxes thereon, and constructed a cement sidewalk in front of it, costing considerably over \$100. None of these facts seem to have been disputed. It will thus be seen that there was sufficient evidence to sustain the other findings of the court, regardless of the question of the statute of limitations. These findings not having been complained of in the brief and argument of the plaintiff, and being amply sustained by the evidence, the decree of the district court is right and should be affirmed.

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We decline to determine the question as to whether or not the court erred in finding that the plaintiff's cause of action was barred by the statute of limitations, because the decree must be affirmed on other grounds, and it is unnecessary to pass upon that question.

For the foregoing reasons, we recommend that the decree of the district court be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the decree of the district court is

AFFIRMED.

LOGAN ENYART, APPELLEE, v. W. F. MORAN ET AL., APPELLANTS.

FILED APRIL 2, 1902. No. 11,513.

Commissioner's opinion, Department No. 2.

1. **Judgment: POWER TO SET ASIDE: JUDICIAL DISCRETION.** The district court has power to set aside, change or modify its judgments during the term at which they are rendered. An application to set aside a decree and allow the introduction of evidence upon a technical point, is addressed to the discretion of the court, and error can not be predicated upon the ruling thereon.
2. **Quitclaim Deed: INNOCENT PURCHASER: ACTUAL KNOWLEDGE OF UNRECORDED LIEN.** A purchaser of real estate, who takes his title by quitclaim deed, with actual knowledge of the lien of an unrecorded mortgage thereon, and who shows by his answer that he had actual notice thereof, and caused inquiry to be made as to the amount of the lien, can not afterwards claim that he is an innocent purchaser for value.
3. ———: ———: ———: **MISTAKE.** Such purchaser, having requested a third person, not the agent of the lien holder, to ascertain the amount due upon the mortgage, can not defeat a recovery of any portion of the mortgage debt on account of a mistake as to the amount of the lien, made by such third person.
4. **Evidence: DECREE: FINDING: MORTGAGE DEBT: PROCEEDINGS AT LAW.** Evidence examined, and *held* sufficient to sustain the decree. *Held*, also, that where there is sufficient evidence to show

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prima facie that no proceedings have been had, or commenced at law, to recover any portion of the mortgage debt, and where such evidence is not disputed, the finding of the court thereon will be sustained.

APPEAL from the district court for Otoe county. Heard below before JESSEN, J. *Affirmed.*

W. C. Sloan and W. F. Moran, for appellants.

E. F. Warren and L. F. Jackson, contra.

BARNES, C.

The appellee filed his petition in the district court of Otoe county to foreclose a mortgage given by one Julia G. Edwards (now known as Mrs. Yager) to one Emma Morton to secure the payment of a promissory note for the sum of \$350, with interest at 7 per cent. per annum. The mortgage covered lot No. 6, in block No. 109, in Nebraska City proper. The petition was in the usual form, and alleged that William F. Moran had some interest in the premises, and that Maude Moran, his wife, had an inchoate dower right therein, but that the right of the appellee was paramount thereto. The appellee took the mortgage from Emma Morton by assignment, and the note by proper indorsement, all of which was duly alleged in the petition. The answer of appellant, W. F. Moran, was, in substance, that he was the owner in fee of the premises described in the mortgage; that Maude Moran is his wife. The answer also denied each and every allegation in said petition not admitted to be true. The answer further alleged that Julia G. Edwards (now Mrs. Yager) was the owner of the undivided three-fourths interest in the said premises; that on May 14, 1898, she conveyed all her right, title and interest in the premises to one Frank Gameral, and that said deed was duly recorded in the deed records of Otoe county on May 18, 1898; that on May 16 Frank Gameral conveyed the said premises to the appellant; that, before purchasing said premises, appellant made diligent search

of the records of Otoe county, Nebraska, to ascertain if there were any liens or incumbrances against the same; that the records of said county showed said premises clear of all liens and incumbrances; that the mortgage sought to be foreclosed was not recorded, and was not filed for record until August 29, 1898, more than three months after purchase of the property by appellant, and more than five years after its execution; that the appellee had due notice thereof, and took the mortgage subject to any and all equities that the appellant Moran had; and that said mortgage was inferior and subsequent to the rights of the appellant. Appellant further alleged that he had no knowledge of the existence of the mortgage at the time he purchased the premises, and was an innocent purchaser for value, without notice of any lien. Appellant also alleged that he negotiated the purchase of the land through one L. F. Jackson, who informed him that J. Sterling Morton had some lien on the land, and thereupon appellant stated that he would have nothing to do with said land until the amount of said lien was ascertained; that afterwards, J. Sterling Morton left a memorandum with Jackson which Jackson informed him stated that the lien was \$70; that appellant, relying on the statement so made by Jackson, purchased Julia G. Yager's three-fourths interest in said real estate, and paid the agreed price therefor, reserving the said \$70 to extinguish the said lien; that soon thereafter Jackson informed appellant that the lien was not in favor of J. Sterling Morton, but was in favor of Emma Morton, and that the amount of the lien was \$170; that on the 31st day of December, 1898, appellant tendered the sum of \$73.25 (that amount being the \$70 and interest thereon from the date of said memorandum), which tender was refused; that said lien was not of record, and that he had no means of knowing what the amount of the lien was, except as stated in the memorandum; that the transfer to the appellee took place long after said note and mortgage were due; that appellee had full knowledge of the appellant's equities; and that the equities of appellant were

superior and prior to those of the appellee. The reply was a general denial. On February 10, 1900, a trial was had, and a decree was rendered in favor of the appellee, and was filed that day. On February 12, 1900, appellee filed a motion to withdraw the rest, and for leave to introduce evidence to support the allegation in the petition that no proceedings at law had ever been had or commenced for the collection of the debt secured by the mortgage. Notice of this motion was given to the appellant, who appeared and resisted the application. The court allowed the rest to be withdrawn, and set aside the decree. Thereupon appellee introduced his evidence in support of the allegation mentioned, and the court again found in his favor. The amount found due was \$200.74, and a decree was rendered in the usual form for the foreclosure of the mortgage. The appellant thereupon brought the case to this court for review. Four propositions are contended for as grounds for a reversal of the judgment of the district court.

1. It is claimed that the court erred in sustaining the motion of the appellee to withdraw the rest, and allow him to introduce testimony in support of the allegation, that no proceedings at law had been had, or commenced for the recovery of the mortgage debt. It goes without saying that the court has full power to vacate, correct or modify its own judgments during the term at which they are rendered. This contention therefore reduces itself to the one question: Was it an abuse of the discretion of the court to sustain the motion of the appellee to set aside the rest, and allow further proof on a purely technical point? The appellant, in his brief, has suggested nothing to show that the court abused its discretionary powers. No authorities are cited in support of his contention, and we therefore hold that the matter was within the power and discretion of the court; that there was no abuse of such discretion, and there was no error in sustaining the motion.

2. The second proposition contended for is, that the appellant is an innocent purchaser for value, and without

notice; that he took the property stripped of any and all liens thereon. This contention can not be maintained, because appellant pleads a knowledge of this lien before and at the time he purchased the property in question, and this is a sufficient answer to the second assignment of error.

3. It is contended that if appellant did not take the property as an innocent purchaser for value, free and clear of any and all liens, then he took it subject only to a lien of \$70. Appellant claims that he exercised due diligence to ascertain the amount of liens upon the premises before he purchased the same. The testimony shows, however, that when he was informed by Jackson, who was the agent of the vendor, Mrs. Yager, that there was a lien upon the premises, known as the "Morton lien," he instituted no sufficient inquiry to ascertain the amount of it. It is shown that the only person he inquired of was Mr. Jackson; that Jackson was not the agent of J. Sterling Morton, or of Emma Morton, or of the appellee. If Jackson acted in the capacity of agent for any one he was the agent of the appellant to make this inquiry and ascertain the amount of the lien. He inquired of J. Sterling Morton as to the amount of this lien, who stated that he would ask his sister, Emma Morton, who was the owner of the mortgage, what amount was due thereon. It appears that afterwards J. Sterling Morton, without comment, handed him a memorandum which showed the true amount to be \$170, but, in reading it, Jackson made a mistake, and informed the appellant that the amount of the lien was \$70; that thereupon appellant purchased the property, and had it conveyed by quitclaim deed to Gameral, who in turn quitclaimed it to him. It is further shown that appellant never saw the memorandum; that he knew nothing about it except what Jackson told him, who, as soon as he ascertained his mistake, informed appellant of that fact. Afterwards the mortgage was recorded, it not having been recorded prior to the purchase of the premises by the appellant. Some time after that, it was sold and assigned to the appellee, who commenced the foreclosure proceedings. The

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court found in favor of the appellee, and rendered a decree for the true amount due and unpaid upon the note and mortgage. And the question is, does the evidence sustain the findings and decree? There was practically no dispute as to the facts in the case. The court seems to have held that the appellant had actual notice of the mortgage lien at the time he purchased the premises in question; that the mistake in the amount thereof was not the fault of the holder and owner of the mortgage lien, nor of the appellee; that it was simply the mistake of Jackson, whom the appellant had requested to ascertain the amount of the mortgage lien for him, which in no manner affected the rights of the lienholder, and therefore rendered a decree for the true amount due the appellee.

4. It is further contended that the evidence was not sufficient to support the finding that no proceedings at law had been had or commenced to recover the debt secured by the mortgage. An examination of the record shows that the evidence established that fact, at least *prima facie*. No proof having been introduced to dispute it, we hold that the evidence was sufficient to sustain that particular finding. Under the well-established rule that where there is any competent evidence to sustain the findings and decree of the trial court in an equity case a court of review will not disturb them, we are constrained to hold that the evidence was sufficient to sustain the judgment and decree of the district court. We therefore recommend that the same be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons set forth in the foregoing opinion, the decree and judgment of the district court is

AFFIRMED.

EMMA L. VAN ETTEN V. EDWARD F. TEST ET AL.

FILED APRIL 2, 1902. No. 11,531.

Commissioner's opinion, Department No. 2.

Ejectment: JUDGMENT: RES ADJUDICATA. A judgment in ejectment is binding on all the parties to the action, and where a party has brought an action in ejectment for the premises claimed by her, which on a trial thereof has resulted adversely to her, she is concluded thereby.

ERROR from the district court for Douglas county.
Tried below before FAWCETT, J. *Affirmed.*

David Van Etten, for plaintiff in error.

Isaac R. Andrews, *contra.*

OLDHAM, C.

On the 18th day of September, 1897, the plaintiff in error filed her petition in the district court of Douglas county, the object and prayer of which are to restrain defendants in error from claiming any interest in certain real estate (describing it), and from interfering with and disturbing her use and enjoyment thereof, and that, upon final hearing, the "injunction be made permanent and that the title and possession of said premises be quieted and confirmed in plaintiff." This petition is exceedingly lengthy, and contains a variety of allegations and recitals, of which the following will serve as a sample: "That said aforesaid verdict, judgment and decision of said supreme court were inconsistent, irregular, unsupported by either pleadings or evidence and fraudulent, the uncontradicted testimony on trial was that defendant's said house stood over and upon said land 7 feet 10 inches; defendant claimed and the jury found only 7 feet; plaintiff was therefore entitled to judgment for the 10 inches and costs, instead of which judgment with costs was rendered against her and said decision affirmed the fraud and was a fraud."

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From among the mass of iterations and reiterations of this petition we gather the information that on the 24th day of March, 1890, she had instituted an action in ejectment against these same parties for these same premises; that the cause had been tried to a jury, who returned a verdict against her, on which judgment was rendered; that she had prosecuted error therefrom to the supreme court, which affirmed the action of the lower court, this action of the supreme court being the provoking cause of the above excerpt. The defendants answered setting up their judgment at law in the ejectment case. A trial was had thereon which resulted in the dismissal of the plaintiff's petition; from which she prosecutes error to this court.

The evidence on the trial shows this judgment in ejectment in full force and effect, with no attempt made or being made to have it set aside, vacated or modified. And in the face of this judgment she attempts to come into a court of equity, and seeks to obtain the results which she sought to obtain in her action in ejectment, but which was denied her there. This can not be done. That judgment, so long as it is allowed to stand, is binding upon her and is conclusive of her rights as to these premises. The trial court should have summarily dismissed this petition on its own motion, and doubtless would have done so had its attention been called to what it contained, vicious recriminations of courts, counsel and parties, with not a fact stated that entitled her to the relief sought. Such attempts as this for "equitable relief" should not be permitted to burden courts or clog the wheels of justice.

We therefore recommend that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JULIUS POESSNECKER ET AL., APPELLANTS, V. FRED ENTEN-
MANN, JR., APPELLEE.

FILED APRIL 2, 1902. No. 11,295.

Commissioner's opinion, Department No. 2.

Application for License to Sell Land: REVIEW. An application to a district court by an executor or administrator for license to sell real property is not an "action in equity" within the purview of section 675, Code of Civil Procedure. Hence a final order made in such a proceeding is reviewable only by petition in error.

APPEAL from the district court for Stanton county.
Heard below before EVANS, J. *Dismissed.*

John A. Ehrhardt, for appellants.

Thomas M. Franse, contra.

POUND, C.

An appeal is prosecuted from an order of the district court dismissing an application by two executors for license to sell real property. At the argument we suggested a doubt whether an appeal would lie in such a proceeding, and a further hearing has been had on that point upon additional briefs. Section 675, Code of Civil Procedure, provides that appeals may be brought to the supreme court by "either party" in "all actions in equity." That section is the sole authority for review in this court by appeal. Does a proceeding such as the one at bar come within its purview? We think not. In *Seward v. Clark*, 67 Ind., 289, it was held that a petition to the court of common pleas for an order to sell real estate to pay debts was not a civil action from which an appeal would lie under general provisions of the law as to appeals. In North Carolina, under a statute providing that when the personal estate of a decedent is insufficient to pay debts the executor or administrator may apply by petition to the superior

court of the county where lands of the estate are situated for an order to sell such lands, it is held that such petition is not an action, but a special proceeding. *Sinclair v. McBryde*, 88 N. Car., 438; *Badger v. Jones*, 66 N. Car., 305; *Pelletier v. Saunders*, 67 N. Car., 261. To the same effect MAXWELL, J., in construing our own statute, in *McClay v. Foxworthy*, 18 Nebr., 295, 298, said: "A proceeding under the statute to sell real estate of the deceased for the payment of debts against the estate is not, strictly speaking, an action. It is purely a proceeding *in rem*, where the principal questions involved are, the amount of debts outstanding against the estate, the amount of personal property available for the payment of the debts, and the necessity to sell the land for which license is sought for the payment of the same. The proceeding is not adversary in its character in the sense in which the term is used in an action, as only so much of the estate descends to the heirs as exists after the payment of the debts." The words "either party" in the section cited clearly indicate an intention to refer to suits of an adversary character, and such causes—those which were maintainable by bill in equity prior to the Code, and not special statutory proceedings more or less remotely analogous thereto—are "actions in equity" within its purview. *Barger v. Cochran*, 15 Ohio St., 460. The only authority we have been able to find indicating the contrary is *Elliot v. Shuler*, 50 Fed. Rep., 454, in which it was held that an application for license to sell lands was removable to the federal court. But it is admitted in the opinion in that case that the application was a special proceeding, and the ground on which it was held removable was that "Congress has conferred upon the United States courts jurisdiction to hear and determine all cases and controversies of whatsoever nature that arise between citizens of different states, and authorized parties entitled by law to apply for the removal of such cases and controversies from the state courts into the United States circuit courts." Hence we do not think that decision applicable to the present

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controversy. All judgments and final orders of the district court, whether made in actions, special proceedings, or otherwise, are reviewable by petition in error, under section 582, Code of Civil Procedure. That section, not section 675, should be resorted to in such proceedings as the one before us.

We recommend that the appeal be dismissed.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the appeal is

DISMISSED.

PRESIDENT AND DIRECTORS OF THE INSURANCE COMPANY OF
NORTH AMERICA, APPELLEES, v. EMMA A. PARKER ET
AL., APPELLANTS.

FILED APRIL 2, 1902. No. 11,437.

Commissioner's opinion, Department No. 2.

1. **Errors of Procedure: REVIEW: APPEAL.** Alleged errors in matters of procedure, occurring at or before trial, are not reviewable by appeal.
2. **Foreclosure: COUNTER-CLAIM: MALICIOUS PROSECUTION.** A cause of action for alleged abuse of process and malicious prosecution of a civil suit, based on an attempt to foreclose a certain mortgage in the federal courts, can not be set up by way of counter-claim in a subsequent suit to foreclose said mortgage.
3. **Foreclosure: ALLEGATION OF NO PROCEEDINGS OF LAW: PRIMA-FACIE CASE.** The allegation that no proceedings have been had at law, required in foreclosure suits, need not be proved beyond possibility of inference to the contrary; it is enough, where no evidence appears to dispute it, if the plaintiff make a prima-facie case.

APPEAL from the district court for Lancaster county.
Heard below before FROST, J. *Affirmed.*

Burr & Burr, Charles M. Parker and E. E. Spencer, for appellants.

Stephen L. Geisthardt, contra.

POUND, C.

This is an appeal from a decree of foreclosure. The principal points argued relate to the action of the trial court in striking out certain portions of the answer and in rejecting evidence offered by appellant at the trial. It is well settled that we can not pass upon such questions on appeal. "Alleged errors in matters of procedure occurring at or before the trial can not be reviewed on appeal." *National Life Ins. Co. v. Martin*, 57 Nebr., 350; *Troup v. Horbach*, 57 Nebr., 644, 648. Nor are rulings upon evidence reviewable otherwise than by error. *Zimmerman v. Zimmerman*, 59 Nebr., 80. We may say, however, that the rulings complained of were clearly right. The answer set up and the evidence offered tended to show abuse of process and malicious prosecution of a civil suit in prior attempts to foreclose the mortgage in question in the federal courts, whereby the appellants were put to large expense, cost and trouble in the employment of counsel, printing of briefs, and in costs and traveling expenses. It is obvious that this is to be sustained, if at all, only as a counter-claim. It is not available as a set-off, nor would it be a proper subject of cross-petition, because not a matter for a court of equity at all. It can not be brought within the provisions of the Code of Civil Procedure as to counter-claims for the reason that it does not arise out of the transaction upon which the plaintiff's cause of action is founded, namely, the execution of the note and mortgage and default in payment, nor is it connected with the subject of the plaintiff's action. *Watts v. Gantt*, 42 Nebr., 869. There the cause of action sought to be made use of as a counter-claim was an alleged libel in proceedings to procure a receiver pending foreclosure of the mortgage sued on. The court held it could not be set up in the foreclosure suit.

It is also urged that the evidence in support of the allegation that no proceedings had been had at law was insufficient to sustain the decree. The evidence makes a

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prima-facie case, and is undisputed. It is true it does not exclude every possible inference. Consistently with this evidence, proceedings at law may have been had somewhere outside of this state. But the mortgagors reside here, and the likelihood of proceedings in any other state is very remote. We think the evidence ought to be held sufficient.

We recommend that the decree be affirmed.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

NOTE.—*Abuse of Process*.—A malicious abuse of legal process, is its employment for some unlawful object not contemplated by the law. *Mayer v. Walter*, 64 Pa. St., 283.—REPORTER.

GLOBE SAVINGS BANK V. NATIONAL BANK OF COMMERCE
OF NEW LONDON, CONNECTICUT, ET AL.

FILED APRIL 2, 1902. No. 11,413.

Commissioner's opinion, Department No. 3.

1. **Bank: FUNDS OF DEPOSITOR: INDEBTEDNESS OF DEPOSITOR: TRUST FUND:** A bank has the right to appropriate the funds of a depositor to the extent of the indebtedness due from him; but if the deposit, or any part thereof, is a trust fund, and the bank has notice of this fact, it will be liable to the true owner if it appropriates such fund to the discharge of an indebtedness due from the depositor.
2. ———: **ENTRIES ON BOOKS: ADMISSIONS: EVIDENCE.** In a suit against a bank, entries on its books, made by its officers or bookkeeper in the regular course of its business, are admissible in evidence on behalf of the adverse party when in the nature of admissions.
3. **Deposit: CUSTOMER: DEBT: CONVERSION.** A bank that appropriates a deposit made by a customer to reduce his indebtedness due the bank, knowing the deposit, or a part thereof, to be a trust fund, is liable to the true owner for a conversion of his money, and an action at law to recover the amount can be maintained.

Globe Savings Bank v. National Bank of Commerce.

· ERROR from the district court for Douglas county.
Tried below before DICKINSON, J. *Affirmed.*

Arthur S. Churchill, for plaintiff in error.

W. W. Morsman, *contra.*

DUFFIE, C.

This is an action brought by the National Bank of Commerce against the Globe Savings Bank and the Globe Loan & Trust Company to recover the proceeds of four paving warrants issued by the city of Omaha, which had been sent by the plaintiff to the Globe Loan & Trust Company for collection, and which were collected by that company October 31, 1895, in the sum of \$1,258.94. The plaintiff's petition alleges that the Globe Loan & Trust Company, fraudulently and without authority, turned the money over to the plaintiff in error, and that it received the money "with full knowledge that the same was the property of the plaintiff and that the defendant Globe Loan & Trust Company had no right or authority to pay and deliver the same to said savings bank." The answer, after admitting the corporate existence of the several parties to the suit, is a general denial. Judgment was entered in favor of the plaintiff below against both defendants, and the Globe Savings Bank has brought error to this court, making the Globe Loan & Trust Company, which refused to join in the appeal, one of the defendants in error.

There were numerous objections to the admission of evidence upon the trial, and the action of the court in admitting certain matters of evidence against the objection of the plaintiff in error is here assigned as error. The case was tried to the court without a jury, and, following the usual practice, an examination of these alleged errors will not be necessary, provided the record discloses sufficient legal and competent evidence to sustain the judgment. The evidence is undisputed that the Globe Loan & Trust Company collected from the City of Omaha the four pav-

ing warrants in question. These warrants and others were paid by the treasurer of the city at the same time by a check drawn on the Nebraska National Bank of Omaha. This check was for the sum of \$4,009.26, and the claim of the plaintiff below is that this check was deposited by the Globe Loan & Trust Company to the credit of its account with the Globe Savings Bank, and by that bank appropriated to its own use. The check itself shows that it was indorsed by the Globe Loan & Trust Company, and that the Globe Savings Bank in some manner came into possession of the check and received the benefit thereof appears from the following indorsement thereon: "Pay to the order of Commercial National Bank for account of Globe Savings Bank. W. B. Taylor, Cashier." It is insisted, however, that there is no competent evidence in the record to show that this check was deposited by the Globe Loan & Trust Company to the credit of its account with the Globe Savings Bank. The cash book and the ledger of the Globe Savings Bank were both introduced in evidence. Both of these books show a credit to the Globe Loan & Trust Company of \$4,009.26 under date of October 31, 1895. The fact that the check was indorsed by the Globe Loan & Trust Company, followed by an indorsement by the Globe Savings Bank to its credit with the Commercial National Bank, and the fact that an item for the same amount is credited to the Globe Loan & Trust Company on the books of the Globe Savings Bank on the day of the date of the check, is, we think, sufficient evidence to uphold a finding that the check was paid into the Globe Savings Bank by the Globe Loan & Trust Company. It is true that the clerk who made the entry on the books of the Globe Savings Bank showing this credit to the Globe Loan & Trust Company, was not called to testify to the correctness of the books, or to show that the item was entered at the time of the transaction; but this, as we understand the rule, is necessary only where a party offers his own books of account to support his claim. The rule, we think, is general that one party may introduce the books of his ad-

versary without the preliminary proof necessary in other cases. In *Perry v. Butt*, 14 Ga., 699, it is said that "entries on the firm books are evidence against the firm, as all the members are presumed to be cognizant of such entries." And in *Currier v. Boston & M. R. Co.*, 31 N. H., 209, it is said: "Entries in the books of a party by his clerk and bookkeeper, are evidence against him, unless shown to be erroneous or mistaken. They will not be rejected because the facts stated were derived from others, and not from the owner of the books." In *German Nat. Bank of Hastings v. Leonard*, 40 Nebr., 676, this court held that book entries, made by a party in the regular course of his business, are admissible in evidence on behalf of the adverse party when in the nature of admissions.

We conclude, therefore, that there is sufficient competent evidence in the record to sustain a finding that the check in question was deposited by the Globe Loan & Trust Company to its credit in the Globe Savings Bank. The evidence is undisputed that at the date of the deposit of this check the Globe Loan & Trust Company was indebted to the Globe Savings Bank in a sum exceeding \$5,000, and the question arises, whether, by using this check to reduce the amount of that indebtedness, the savings Bank converted the money of the Commercial National Bank, and is liable therefor in this action. There can be no question that a bank has a lien on the deposits of its customers for any debt due, and that it may apply a deposit made by a customer indebted to it in payment of an overdraft or any indebtedness which the bank may hold against him. This is the general rule; but, like all general rules, it has its exceptions. A bank can not apply money paid in by a customer and held by him as trustee for another to the payment of its own debt. If the bank has knowledge of the trust relation it will be liable for a conversion of the fund in case it applies it in satisfaction of its own indebtedness.

In *Central Nat. Bank v. Connecticut Mutual Life Ins. Co.*, 104 U. S., 54, it was held that when, against a bank ac-

count designated as one kept by the depositor in a fiduciary character, the bank seeks to assert its lien as a banker for a personal obligation of the depositor known to have been contracted for his private benefit, it must be held as having notice that the fund represented by the account is not the individual property of the depositor if it is shown to consist, in whole or in part, of funds held by him in a trust relation. In *American Trust & Banking Co. v. Boone*, 102 Ga., 202, it is said: "A bank can not, without incurring liability to the true owner, knowingly appropriate to the satisfaction of a debt due to it by another trust funds deposited with it by him after the creation of such debt." In *Bundy v. Town of Monticello*, 84 Ind., 119, it was held that a trust fund, or money substituted for such fund, may be recovered from the trustee, and all persons having notice of such trust into whose hands such fund may come. An extensive and interesting note covering the law on the question involved will be found in *Rochester & Charlotte Turnpike Co. v. Pavionur*, 52 L. R. A. [N. Y.], 790.

The Globe Loan & Trust Company and the Globe Savings Bank transacted business in the same building and used the same vault, and both corporations were largely composed of the same stockholders and officers. The same person was president of both corporations, and the cashier of the Globe Savings Bank, who indorsed the check in question for deposit in the Commercial National Bank to the credit of his own bank, was secretary and treasurer of the Globe Loan & Trust Company, and other officers of the Globe Savings Bank were trustees and officers of the Globe Loan & Trust Company; so that the bank was chargeable with knowledge that the check taken by the Globe Loan & Trust Company in payment of the warrants of the plaintiff below was a trust fund, and that it could not be appropriated, to the extent, at least, of the interest of the defendant in error, to reduce the amount due from the Globe Loan & Trust Company to the Globe Savings Bank. Having this knowledge, and making the appropriation, was a conversion of the fund, and, having converted

the money of the defendant in error, there is no doubt of its liability for the money converted.

Objection is made to the form of the action, and it is said that the plaintiff below should have proceeded in equity to reach this fund. If the fund was still in the bank to the credit of the account of the Globe Loan & Trust Company there would be force in this suggestion. In *Central Nat. Bank v. Connecticut Mutual Life Ins. Co.*, *supra*, it is said: "When a bank account was opened in the name of a depositor, as general agent, and it was known to the bank that he was an agent of an insurance company; that conducting its agency was his chief business; that the account was opened to facilitate that business, and used as a means of accumulating the premiums on policies collected by him for the company, and making payment to it by checks,—the bank is chargeable with notice of the equitable rights of the company, although he deposited other money in the same account and drew checks upon it for his private use. The company may enforce, by bill in equity, its beneficial ownership therein against the bank, claiming a lien thereon for a debt due to it, which he contracted for his individual use." This, we believe, announces the correct rule, and if the defendant in error was asserting its rights as against a fund still in possession of the bank, but held by the bank in the name of the Globe Loan & Trust Company, then a suit in equity would be a proper action to establish the trust and to enforce the relief to which it was entitled, although we do not care to say that it is the only action that could be maintained, a decision of that question not being necessary in this case. In the present case, however, the fund is no longer in the bank. There is no account to the credit of the Globe Loan & Trust Company standing upon the books of the Globe Savings Bank. There is no fund to be reached upon which to impress a trust. The fund has been converted, and, having been converted, the only remedy offered defendant in error was a suit at law for its damages.

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We recommend that the judgment of the district court be affirmed.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. CLARK & LEONARD INVEST-
MENT COMPANY, V. COUNTY OF SCOTT'S BLUFF ET AL.

FILED APRIL 2, 1902. No. 11,534.

Commissioner's opinion, Department No. 3.

1. **Judgment Against County: LEVY: DISBURSEMENT: WARRANT.** Article 6 of chapter 77 of the Compiled Statutes, making provision for the levy and collection of a tax to pay judgments entered against a county or other municipal corporation in this state, contains no special provision for disbursing the fund; hence the usual course of drawing money from the county treasury by obtaining a warrant against the fund must be pursued by the judgment creditor.
2. ———: ———: ———: ———: **MANDAMUS.** The board of county commissioners should draw a warrant in favor of the judgment creditor for the amount of any judgment tax collected, when demand is made by him therefor, and when any considerable amount has been collected, and is in the hands of the county treasurer applicable to the payment of the judgment; and the duty of the treasurer to pay such warrant may be enforced by mandamus.

ERROR from the district court for Scott's Bluff county.
Tried below before GRIMES, J. *Affirmed.*

Stephen L. Geisthardt, for plaintiff in error.

F. A. Wright and Gardner & Mann, contra.

DUFFIE, C.

The Clark & Leonard Investment Company is a judgment creditor of Scott's Bluff county. The petition al-

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leges that the judgment is wholly unpaid and in full force and effect; that after the rendition of the judgment the county made provision for the payment thereof by the levy of a tax, a large part of which has been collected, and is now in the hands of the county treasurer; that the amount so collected is sufficient to make a material payment, and that all of the tax so collected is applicable for the payment of said judgment; that the relator has demanded of the defendants that they apply the funds on hand to the payment of its judgment, and have offered to credit such amount as may be paid thereon; that the defendants have failed and refused to make such payment. The prayer is for a writ of mandamus commanding the defendants to pay to the relator the amount in the hands of the treasurer, and to do and perform such other acts and things as may be necessary and proper in the premises. A general demurrer was filed to this petition, which was sustained, and the relator has brought the case here on error.

By demurring to the petition the defendants admit the facts alleged. We have, therefore, a case where it is alleged and admitted that the relator is the owner of a judgment against the county of Scott's Bluff; that a tax has been levied for the payment thereof, and sufficient of the tax collected to discharge a large part of the judgment. That it is the duty of the defendant county to pay a valid judgment can not be denied, and the only defense, as we understand from the briefs on file, is that the relator has failed to procure a warrant from the county authorities authorizing and directing the treasurer to disburse the fund. Section 91, chapter 18, article 1, Compiled Statutes of 1901, defines the duties of the treasurer in disbursing funds in his hands, as follows: "It shall be the duty of the county treasurer to receive all money belonging to the county, from whatsoever source derived, and all other money which is by law directed to be paid to him. All money received by him for the use of the county shall be paid out by him only on the warrants issued by the county board according to law, except where special provision for

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the payment thereof is or shall be otherwise made by law." Section 2, article 6, of chapter 77 of the Compiled Statutes makes provision for the payment of judgments entered against municipal corporations in this state: "If the amount of revenue derived from taxes levied and collected for ordinary purposes shall be insufficient to meet and pay the current expenses for the year in which the levy is made, and also to pay the judgment remaining unpaid, it shall be the duty of the proper officers of the corporation * * * to at once proceed and levy and collect a sufficient amount of money to pay off and discharge such judgments." No provision is made in the statute for disbursing the fund, and the presumption must obtain that it was the intent of the legislature that a judgment tax, when collected, should be disbursed and paid out by the county treasurer as other funds coming to his hands for which no special provision was made by statute. Such appears to have been the opinion of this court in regard to the payment of interest maturing upon bonds issued, and payable under the provisions of chapter 35 of the General Statutes of 1873. *State v. Thorne*, '9 Nebr., 458. In that case the relator applied for a writ of mandamus to compel the defendant, as treasurer of Adams county, to pay from the funds in his hands, collected for that purpose, the interest due on certain precinct bonds, issued by the commissioners of the county and held by the relator. Relating to the necessity of a warrant or order directed to the treasurer for the payment of the interest, Judge LAKE said: "When these bonds were issued there was no special provision of statute governing alone the creation and payment of this sort of indebtedness, but the whole business was assimilated to that respecting county indebtedness for a similar purpose, and, like it, was put in charge of the county commissioners of the proper county, who were not only required to issue the bonds when voted, but also to cause to be annually levied, collected, and paid to the holders of such bonds, a special tax on all the taxable property within the precinct, sufficient to pay the annual interest

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as it falls due, and finally the bonds themselves at their maturity. * * * As before stated, the management of this sort of precinct indebtedness is made to conform to that of counties of like character. The sole distinction is that it concerns a distinct portion only instead of the whole body of the county. The money with which to meet the obligations of a precinct is raised and paid out with the same formality, and through precisely the same agencies, as are the ordinary county funds, and, except where there is some special provision of statute authorizing it, payment therefrom can be legally made only on 'warrants issued by the county commissioners according to law.' Sec. 53, ch. 13, General Statutes, 241. Therefore, to have justified the defendant in making the payment demanded, the relator should first have obtained from the county commissioners the proper order for him to do so. But having neglected this step, the relator was not in a situation to make a legal demand for the money, and the defendant was right in withholding it." This seems to settle the question of the right of the treasurer to refuse payment of any sum in his hands upon the relator's judgment until an order from the county commissioners is presented directing him to make such payment. The manner of making payment and vouching the debt to be paid is regulated by the general statute, no special provision being found to control. The duty of the county and of the commissioners to issue an order for the payment of money held by the treasurer, collected for the payment of this judgment, can not, however, be denied.

In *United States v. Buchanan County*, 5 Dill. [U. S. C. C.], 285, it was held by the circuit court of the United States that a judgment of the court upon the bonds of the county issued in aid of a railroad company may be enforced by mandamus to compel the levy and collection of taxes, or, if the amount is already in the county treasury, applicable to such debts, to compel the county court to draw a warrant to pay the judgment. It will be observed from the language used that Judge Dillon, who delivered

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the opinion of the court, seemed to reach the conclusion that a warrant was necessary in order to draw the fund from the county treasury. It was argued at the bar that if the relator was bound to present his judgment to the county commissioners to have the same audited and allowed as other claims, and a warrant issued thereon, the acceptance of the warrant would operate as a satisfaction of his judgment, and that in case of refusal to pay the same he would be driven to another action against the county, and would be no nearer the collection of his claim against the county than when he instituted his first suit. We can not accept this view of the situation. The issue of a warrant directed to the treasurer for the payment of the judgment fund on hand will not operate as a payment of the judgment. In *State v. Cook*, 43 Nebr., 318, it is said: "In the absence of a statute conferring special characteristics upon warrants the authorities are practically unanimous that such instruments are merely devices for properly drawing money from the treasury; they are little more than certificates of indebtedness. 'The warrant is not intended to constitute a new debt or evidence of a new debt * * * but is the prescribed means the law has devised for drawing money from the county treasury.'* An indorsee may sue upon such warrant, not because he has title under the law merchant, but because the indorsement amounts to an assignment of the debt upon which the warrant is issued. The auditing of claims and issuing warrants therefor are not such settlements as to have the force of a judicial proceeding or to estop the corporation issuing the warrant." When the relator obtains a warrant directed to the treasurer for the payment of this money, it will be the duty of the treasurer to pay the same, and, in case of refusal, a mandamus will issue to compel him to perform his duty. In *State v. Gandy*, 12 Nebr., 232, a mandamus was awarded to compel the treasurer to pay county warrants, it appearing that there were sufficient funds in the treasury for that purpose.

**Dana v. City of San Francisco*, 19 Cal., 486.

The money collected for the payment of this judgment can be used for no other purpose. Until this judgment is fully paid and satisfied the funds must remain intact. There is no danger that the relator will lose the fund, or that it will be paid out on other demands. The treasurer would himself be liable should he divert the fund. It is probable that the treasurer would not be compelled to disburse funds upon a warrant drawn for a greater amount than he holds to the credit of that particular fund, and, while the creditor could not be compelled to accept payment of his judgment in instalments, still we believe that if he is willing to do so, and makes demand upon the board of county commissioners for a warrant to enable him to draw from the county treasury money collected for the payment of his judgment, it would be the duty of the commissioners to issue to him a warrant for the amount then collected and on hand, although not sufficient to satisfy the judgment in full. Public policy and due regard for the interests of the taxpayers of the county would require the commissioners to disburse the fund as fast as collected in any considerable amount, rather than to have the fund accumulate in the county treasury while interest is accumulating upon the judgment.

For the reasons that the relator has not alleged a demand for a warrant for the payment of the amount collected and in the hands of the treasurer, we recommend that the judgment of the district court be affirmed.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

WILLIAM M. IODENCE, APPELLEE, v. HERMAN A. PETERS ET
AL., APPELLANTS.

FILED APRIL 2, 1902. No. 11,272.

Commissioner's opinion, Department No. 3.

1. **Intervener: DEFECTIVE PETITION: DISMISSAL: APPEAL.** An intervener whose petition does not state facts sufficient to constitute a cause of action, and who does not pray for any judgment which the court has jurisdiction to render, should be dismissed from the action; and if he obtains a judgment with which he is not satisfied, and appeals therefrom, this court will render the judgment of dismissal which ought to have been rendered below.
2. **Real Estate Sold for Taxes: CONSTITUTIONAL GUARANTY.** By the constitution of this state owners of real estate sold for taxes are guaranteed two years from the date of the sale within which to redeem, and the statute provides that a tax purchaser, or his assignee, shall not be entitled to foreclose his lien until after the time of redemption has expired. It follows that a petition seeking to foreclose a tax lien which does not show that the land has been sold for taxes, and that at least two years have expired after the date of the sale, does not state facts constituting a cause of action.
3. **Petition: OBJECTION.** The objection that a petition is indefinite and uncertain can not be presented for the first time in this court.
4. **What Constitutes a Mortgage.** An instrument in writing, properly executed, which shows upon its face that it is intended to charge a lien upon real estate to secure the payment of a specified debt, is sufficient to constitute a mortgage in this state.

APPEAL from the district court for Dawes county.
Heard below before WESTOVER, J. *Affirmed in part.*

Allen G. Fisher, for appellants.

Albert W. Crites, contra.

AMES, C.

This is an appeal from a decree of foreclosure and sale of certain real estate for the satisfaction of a mortgage and of tax liens thereon. None of the evidence adduced on the trial was preserved in the form of a bill of excep-

tions, and we have therefore to inquire only whether the decree is warranted by the pleadings. The petition for the foreclosure of the mortgage alleges that the instrument, together with the notes the payment of which it is conditioned to secure, were executed to the McKinley-Lanning Loan and Trust Company, and afterwards, for value, indorsed, assigned and delivered to the plaintiff. The granting clause of the mortgage runs to the trust company, or its successors or assigns. The answer is substantially a general denial. It is objected to the petition, first, that it does not allege that the payee and mortgagee is a corporation; but this is not important. A partnership may be the payee of negotiable paper and the grantee in a mortgage executed to secure its payment. The question whether it may also be a grantee in a deed purporting to convey the fee of real estate is not presented. The second objection, that the use of the connective "or" instead of "and" in the granting clause makes the description of the mortgage so indefinite and uncertain as to avoid the instrument, is not well taken. The intent of the parties to charge the land with a lien for the security of the notes in which the trust company was named as payee is not doubtful, and this is all that is required in this respect to constitute a valid mortgage in this state. The petition contains an allegation "that no action at law has ever been brought in any court for the recovery of the amount due on said promissory notes and mortgage deed, nor has any part thereof ever been collected and paid, and the full amount thereof for principal and interest is now due this plaintiff thereon." It is objected that this is not a sufficiently definite allegation that no proceedings at law have been had for the recovery of the mortgage debt or any part thereof, and that said debt and no part thereof has been collected or paid; but the language used is very nearly equivalent in meaning to that employed in the statute, and no objection was made in the district court, either by demurrer or by motion to make it more definite and certain. In accordance with an often-repeated rule of this court,

the petition must be regarded as sufficient when assailed for the first time upon appeal.

The tax liens were brought into the litigation by a petition in intervention filed by the appellant West. The land was sold to the county for delinquent taxes on the 20th day of August, 1898. On the 13th day of July, 1899, after the beginning of the foreclosure suit, the certificates were sold and assigned to the intervener, and his petition in intervention was filed on the same day. To this petition no answer was ever made, and on the 12th day of September, thirteen months after the tax sale, the court by its decree adjudged a first lien in behalf of the intervener for the amounts named in his certificates and tax receipts, with twenty per cent. interest from dates of payment, but refused to award him attorney's fees thereon, and the decree is silent as to the rate of interest to be borne thereby. In this decree all parties acquiesced, except the intervener, who appeals and complains because he was not allowed attorney's fees, and because the amount found due is not adjudged to bear ten per cent. interest. We think that he has no just cause of complaint. His action for foreclosure, by intervention, was prematurely brought, and but for the acquiescence of the other parties to the suit should have been dismissed. By the terms of the statute under which he claims (Compiled Statutes, ch. 77, art. 4), he succeeded only to the rights of foreclosure acquired by the county by reason of the tax sale, and by the same statute that right did not accrue until fourteen months after his petition was filed and eleven months after the decree was entered; that is to say, not until after the time of redemption had expired, which is fixed by both the constitution and the statute at the expiration of two years from the date of sale.

There was no answer or other pleading or appearance to the petition in intervention by either of the other parties to the action, and the petition prayed for no judgment which the trial court had jurisdiction to render. The authority of this court in case of reversal upon error or appeal is limited by section 594 of the Code "to render-

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ing such judgment as the court below should have rendered, or to remanding the cause to the court below for such judgment." The last named court could not lawfully have rendered a judgment of foreclosure and sale of the premises for any amount, for the satisfaction of the intervenor's alleged lien for taxes, and its attempt so to do must be reversed and vacated. The intervenor does not plead any facts showing that his rights as prior lienholder were in any way imperiled by the foreclosure proceeding, and it is impossible to conceive that they could have been in any respect affected thereby. A mere finding or decree by the court that he had a valid prior lien for taxes on the premises, which, if not sooner discharged, would mature more than a year subsequently, was not prayed for, and if granted would not have benefited his condition in any respect. He therefore advanced nothing in his pleading which called for any judicial action. Having, under such circumstances, obtained a judgment in his favor, one of two courses was open to him. First, to acquiesce therein as did the other parties to the suit; or to appeal to this court and obtain a reversal and a dismissal of his proceeding in intervention.

It is recommended that the judgment of the district court, in so far as it decrees a foreclosure and sale of the premises for the satisfaction of the plaintiff's mortgage, be affirmed, but that, in so far as it decrees a foreclosure and sale for the satisfaction of the intervenor's tax lien, it be reversed, and the petition in intervention dismissed.

DUFFIE and ALBERT, CC., concur.

By the Court: For reasons stated in the foregoing opinion, it is ordered that the judgment of the district court, in so far as it decrees a foreclosure and sale of the premises for the satisfaction of the plaintiff's mortgage, be affirmed, but that, in so far as it decrees a foreclosure and sale for the satisfaction of the intervenor's tax lien, it be reversed, and the petition in intervention dismissed.

JUDGMENT ACCORDINGLY.

W. A. SAUSSAY ET AL. V. WILLIAM J. LEMP BREWING COMPANY.

FILED APRIL 2, 1902. No. 11,418.

Commissioner's opinion, Department No. 3.

1. **Judgment: JUSTICE OF PEACE: REVIEW: TRANSCRIPT.** When the judgment of a district court, in a proceeding in error to review the judgment of a justice of the peace, is sought to be reviewed in this court, the transcript in this court must contain the judgment of the justice of the peace and such other process and proceedings as are sought to be reviewed or corrected.
2. **Error: PROCESS: AMENDMENT OF RETURN: BILL OF EXCEPTIONS.** This court can not decide whether the district court erred in permitting an amendment to the return of a process, unless the process and the original return thereto, or authenticated copies of them, are preserved in the record or bill of exceptions.
3. **Transcript of Journal: ABSENCE: RECITAL IN BILL OF EXCEPTIONS.** When the record in a proceeding in this court does not contain a transcript from the journal of the district court of an alleged order made by that court, its absence is not supplied by a recital in the bill of exceptions, certified by the court reporter to be true, that such an order was made, if the judge, at the time of settling the bill of exceptions, certifies that the recital is false and orders it to be stricken out.

ERROR from the district court for Douglas county.
Tried below before KEYSOR, J. *Affirmed.*

Charles Ogden and Joel W. West, for plaintiffs in error.

Ed P. Smith and James B. Sheean, contra.

AMES, C.

This case has apparently been brewing a good while, but the results disclosed by the record in this court are not such as to apprise us with any certainty what it is all about, or to enable us to pass upon them either intelligently or intelligibly. The transcript contains what purports to be a copy of an affidavit in replevin in a justice's court in an action in which the William J. Lemp Brewing Company, a corporation, is named as plaintiff, and one

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W. A. Saussay, a constable, and Kirchoff & Neubarth, apparently a copartnership, are named as defendants; but this document does not purport to have been certified by any justice of the peace, to have ever been filed before him, or to have ever been in his official custody. Following this are a motion for a new trial in the district court of Douglas county in the case at bar and an order overruling the same and a judgment by the last-named courts dismissing the action in that court, and for costs. There is a bill of exceptions preserved in the district court, to which are attached six exhibits, as follows: First, a bill of particulars in the justice's court in a suit by Kirchoff & Neubarth against Henry Wiese and Frederick Dahlman. Second, a summons issued by a justice of the peace upon said bill of particulars, with a return of service thereon by W. A. Saussay. Third, what purports to be a copy of an affidavit in replevin identical with that above mentioned and contained in the transcript. Fourth, a purported copy of a summons in replevin issued by a justice of the peace as pursuant to said purported copy of an affidavit in replevin, and a purported copy of a return of said writ by a constable, but it appears sufficiently from the bill of exceptions that this return was not in fact made by a constable or other officer. Fifth, a purported copy of an execution issued by a justice of the peace upon a judgment in favor of the plaintiff, in a suit by Kirchoff & Neubarth against Henry Wiese and Frederick Dahlman, together with a purported copy of a return by W. A. Saussay, constable, showing a levy upon certain personal property. Sixth, a purported copy of a writ in replevin in justice's court at the suit of the William J. Lemp Brewing Company against W. A. Saussay and Kirchoff & Neubarth. There is also attached to the bill of exceptions what purports to be a copy of a justice's judgment in favor of the plaintiffs in the suit of Kirchoff and Neubarth against Wiese and Dahlman. Neither this judgment nor any of the foregoing exhibits bear any official certification or other authentication. There are no pleadings in the tran-

script in the case at bar, no judgment or transcript or purported copy of one in a justice's court in any action in replevin, and no petition in error in the district court to review any such judgment.

The requirement of section 586 of the Code, that "the plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified," applies equally to proceedings in error in the district court and in this court, and in the absence of such a transcript the court has no jurisdiction to proceed further than to dismiss the petition in error. *Zink v. Westervelt*, 52 Nebr., 90. It follows that the judgment of the district court was the only one that it could rightfully have rendered upon the record before us. Whether in an earlier stage of the proceeding the district court reversed a judgment of an inferior tribunal, or how this case found its way to a place upon its docket, or what was the precise subject of the litigation, or how the court acquired jurisdiction over it, the transcript does not disclose. We may gather from the bill of exceptions that the principal controversy was over the truth or falsity or the sufficiency of the return of a constable to a writ of replevin issued by a justice of the peace, and as to the right or authority of the court to amend the return, or permit it to be amended. ✓

It is contended by the plaintiff in error that the district court did make an order permitting such an amendment, but the record contains no transcript of such order. The bill of exceptions contains an entry showing that the court did make such an order, and the court reporter certifies that the entry is true, but the judge in his certificate to the bill asserts that it is false, and orders it to be stricken out.

We think it is usually regarded as the better practice in such cases to accept the certificate of the judge rather than that of the reporter. If the other matters inquired into upon the trial were to be considered, we should have no hesitancy in saying that the conclusions of the court

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adverse to the plaintiff in error are sufficiently sustained by the evidence.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

A. J. DOCKARTY ET AL. V. LULA P. TILLOTSON.

FILED APRIL 2, 1902. No. 11,524.

Commissioner's opinion, Department No. 3.

1. **Agency: WITNESS: PROOF BY DECLARATIONS OF AGENT: COUNTER-PROOF.** Although agency can not be proved by the admissions or declarations of the alleged agent alone, yet if, in an action against an alleged principal, the latter calls the former as a witness and induces him to testify that he never represented himself as an agent with respect to the transaction in dispute, the testimony may be contradicted by proof of specific instances in which the witness did so represent himself. In other words, he may be subjected to the same tests of credibility as would be applicable to other witnesses under like circumstances.
2. **Agent: CONTRACT: PERSONAL LIABILITY.** An agent, who contracts in his own name with respect to matters within the scope of his agency is personally obligated, although the fact of such agency is known to the opposite party.

ERROR from the district court for Douglas county.
Tried below before FAWCETT, J. *Affirmed.*

Crane, Crane & Irwin and *J. J. Boucher*, for plaintiffs
in error.

William R. Patrick, contra.

AMES, C.

The plaintiff in error Dockarty was engaged in Omaha, in this state, in a business which consisted in teaching

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pupils the art of making and drawing designs for letter-heads, bill-heads, checks, drafts, etc., and in making of such designs and procuring them to be engraved for the use of persons desiring them, who were his patrons or customers for pay. The designs, when prepared, were sent by him to the plaintiff in error the "Illinois Engraving Company," an Illinois corporation at Chicago, where they were engraved. The engraved plates were sent by the company to Dockarty at Omaha, and used by him at the latter city for printing the designs. Dockarty paid the company at a specified rate for its share of the services rendered. The defendant in error, Miss Tillotson, had been a pupil at Dockarty's establishment, and, after having acquired sufficient proficiency in the art, accepted employment therein. After the lapse of some time she retired from the service, and sued Dockarty and the company in justice's court for a sum alleged to be a balance due her for wages. She recovered a judgment for the amount of her claim, from which an appeal was taken to the district court, where, upon trial, a verdict was returned, and a judgment rendered in her behalf. The defendants have brought the record to this court for review by petition in error.

It is the contention of Miss Tillotson that although her business engagements were made with, and her services nominally rendered to, Dockarty personally, yet that in fact the latter was the agent of the Illinois company in the conduct of the business, and that the company was therefore obligated to her for her services rendered at his instance. Whether such was the fact is the sole question litigated in the case. As a part of her evidence the plaintiff below offered a blotter used by Dockarty in his business and for advertising purposes, which was shown to have been printed from an engraved plate made by the Illinois company, and which contained, besides some ornamental designs, the following words:

"Illinois Engraving Company, Originators, Designers, Illustrators, Colorists. Wood Engraving, Zinc and Half-Tone Etchings, Colortypes, Etc. Western Branch, Omaha,

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Nebr., A. J. Dockarty, Gen. Mgr. Mel Uhl, Bus. Mgr. Offices and Art Rooms 616-17 Paxton Block."

It was objected by the company that, although the plate was engraved by its employees and at its works, it was not made to appear that any of its officers or agents, having authority to bind it, knew of the fact or had assented thereto; but the objection was overruled and the paper admitted, and we think correctly so. While it is not conclusive that Dockarty was an agent as alleged, and as represented by the printed matter, yet the closely related nature of the two businesses and the apparent business intimacy between him and the company, were circumstances which, taken in connection with the advertisement, were proper to be considered by the jury, and entitled the document to admission as evidence.

Dockarty, who was the only witness for the defense, denied in that capacity that he had ever held himself out or represented himself to be the agent of the company, and for the purpose of contradicting him in this respect a letter to a prospective pupil, written by him upon a sheet of paper at the head of which was printed, from an engraved plate, substantially the same matter as that upon the blotter, was offered by the plaintiff and admitted in evidence. Objection was made upon the ground that it was not shown where or by whom the engraving was made, or that the company had any knowledge of its existence or of the use of the letter-head by Dockarty, and that proof of an agency can not be made, as against the alleged principal, by the declarations or admissions of the person whose agency is denied. The rule as thus generally stated is doubtless correct, but it can not, consistently with justice, have so universal an application as is contended for by the plaintiffs in error. If the alleged agent had not himself been brought forward as a witness, the letter-head would not have been admissible as between the defendant in error and the company; but when the company produced him as a witness in its own behalf, concerning this very issue, it submitted his testimony to all the tests of truthfulness

which would have been applicable to that of any other witness. If the person to whom the letter was addressed had testified that Dockarty had never, to her knowledge, represented himself as an agent of the company, it will not be questioned that she could have been contradicted, by way of impeachment, by the production of the document. If so, why may not he be subjected to the same ordeal? If the paper, having been admitted, had a tendency to affect the minds of the jury concerning the real issue, that is a misfortune voluntarily incurred by the company in producing the witness, and permitting him to testify with respect to this branch of the inquiry. But, having chosen so to do, it can not insist that, having elicited from him a statement such as it desired, his credibility shall not be impeached because the evidence requisite therefor has a tendency to establish the fact of agency by his own declarations or admissions.

Several of the instructions given by the court are complained of, but, in our view of the relevance and character of the evidence, they are not objectionable. They fairly submitted to the jury the matters of fact in issue upon conflicting evidence, and afford no ground for disturbing their verdict in so far as it affects the engraving company. But the jury returned a joint verdict against both defendants, who filed separate motions for a new trial, and separate petitions in error in this court, each alleging that the verdict, as to the moving defendant, is not supported by sufficient evidence.

It is contended on behalf of Dockarty that, if the verdict and judgment against the engraving company are sustained by sufficient evidence, they must fail, as to him, because of the rule that an agent who contracts in behalf of his principal is not himself personally obligated. But counsel overlook an important exception. It was testified to by Dockarty, and not disputed, that he contracted for the services of the defendant in error in his own name, and in such cases the agent is personally bound, even although the fact of the agency be known, and the transaction is in

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furtherance of the business of the principal, so that the latter is also bound. Story, Agency [7th ed.], sec. 269 *et seq.* and notes. He is at liberty, if he chooses so to do, to add his own personal liability to that of his principal. That he is equally bound if he contracts in his own name in behalf of an undisclosed principal is familiar law, not requiring the citation of authorities for its support. That Dockarty is impaled upon one or the other horn of the dilemma is beyond dispute. The cases cited in the brief of plaintiffs in error, in which either there was a contract by a pretended agent without authority, or a contract by an agent in the name of the principal, are not in point.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

CLEM B. ACHENBACH ET AL. V. JOHN M. POLLOCK.

FILED APRIL 2, 1902. No. 10,506.

1. **Reversal of Judgment: MOTION FOR NEW TRIAL.** A judgment will not be reversed for errors which are required to be assigned on a motion for a new trial, unless it is alleged in the petition in error and shown by the record that the court erred in overruling such motion.
2. **Verdict.** Verdict examined, and held sufficient to support the judgment rendered thereon.

ERROR from the district court for Lancaster county.
Tried below before HALL, J. *Affirmed.*

Billingsley & Greene, for plaintiffs in error.

Kirkpatrick & Hager, contra.

ALBERT, C.

This is an action in replevin. There was a trial to a jury, which resulted in a verdict for the plaintiff. From a judgment rendered thereon, the defendants prosecute error to this court.

All assignments of error, save one, which will be noted presently, are predicated on the rulings of the trial court, which are required to be brought, and which were thus brought, to its attention by motion for a new trial. The ruling of the court on that motion is not complained of in the petition in error. Such being the case, the question arises whether the failure to assign error on the ruling of the court on the motion for a new trial precludes an examination of such errors here. This court has twice passed on that question. In *Chicago, B. & Q. R. Co. v. Cass County*, 51 Nebr., 369, in an opinion by RAGAN, C., it was held that such errors would be reviewed, notwithstanding such omission. No authorities are cited in support of that opinion. In *James v. Higginbotham*, 60 Nebr., 203, in an opinion by SULLIVAN, J., a contrary conclusion was reached. So the question is still an open one in this state. In our opinion, the latter case states the correct rule, and is fully sustained by the authorities there cited. The defendants are here seeking to reverse the judgment of the trial court. It is but fair to assume that they are satisfied with every ruling of which they make no complaint. They make no complaint of the ruling on the motion for a new trial. In other words, they are satisfied with that ruling. If they are satisfied with that ruling, then they must be held to have waived every error assignable in such motion. *Lowrie v. France*, 7 Nebr., 191; *Murray v. School District*, 11 Nebr., 436.

It may be suggested that the assignment that the court erred in overruling the motion for a new trial is covered by an assignment in detail of the rulings complained of in such motion. With equal truth could it be said that, having taken an exception to each of such rulings, an excep-

tion to the ruling on the motion for a new trial is superfluous. But this court has held otherwise, in the two cases last cited. Both suggestions are based on the assumption that, if any of the rulings complained of in the motion were erroneous, it necessarily follows that an order overruling such motion is also erroneous. That this is not true, is obvious. The motion may have been filed out of time. Errors in the progress of the trial may have been subsequently waived. There may have been an improper joinder of parties to the motion, or other reasons to justify the court in overruling it. If so, whatever the intrinsic merits of the motion, none of the rulings therein complained of can be successfully urged in this court as grounds for reversal. Hence, were every ruling, which is required to be brought to the attention of the trial court by motion for a new trial, assigned in the petition to this court, yet, in the absence of complaint of the ruling on such motion, the presumption of regularity in the proceedings of the trial court is not negatived. To our minds it is clear that a failure to complain in the petition in error of the ruling on the motion for a new trial precludes an examination of the rulings made by the trial court during the progress of the trial. That such assignment is rarely omitted clearly indicates that the profession regards it as essential.

This leaves us but one question to determine, and that is whether in this case the verdict is sufficient to support the judgment. The verdict is as follows:

"The jury duly impaneled and sworn in the above entitled cause do find that at the time of the commencement of this action the right of possession of the property in controversy herein was in the plaintiff, and we assess the damages sustained by the plaintiff by reason of the wrongful detention of said property by the defendants at the sum of four hundred and twenty-five dollars."

The judgment rendered on the foregoing verdict is as follows:

"It is therefore considered and adjudged by the court

* * * that the said plaintiff John M. Pollock do have and recover of and from the said defendants Clem B. Achenbach and the Nebraska School Supply Company, the sum of \$425 damages as assessed by the jury, with interest thereon at the rate of seven per cent. per annum, from this date until paid, together with costs of this action taxed at \$145.83."

Considered apart from the other errors assigned, as we are compelled to consider it, for the reasons hereinbefore stated, there is nothing in the verdict of which the defendants should be heard to complain, in view of the record. There are other findings which the plaintiff might have insisted on, but such omissions, if they exist, are to the advantage, instead of the detriment, of the defendants. So far as the jury speak by their verdict, they find the right of possession in the plaintiff, and the amount of damages he sustained by reason of the wrongful detention of the property. That finding is amply sufficient to support the judgment in this case. But the defendants insist that there is no law under the statutes of Nebraska providing for any other judgment than one for the defendants. This contention is based on the peculiar wording of section 192 of the Code of Civil Procedure, which is as follows: "In all cases, when the property has been delivered to the plaintiff, where the jury shall find for the plaintiff, on an issue joined, or on inquiry of damages upon a judgment by default, they shall assess adequate damages to the plaintiff for the illegal detention of the property; for which, with costs of suit, the court shall render judgment for defendant." It will be observed that the last word, "defendant," was evidently intended for "plaintiff," and it has been so held in *Blue Valley Bank v. Bane*, 20 Nebr., 294, 300. But it is urged that said section, and the one immediately following it, in so far as they authorize any other judgment than one for the defendants in the court below, is in contravention to section 11 of article 3 of the constitution, and therefore void. It is not necessary to go into the constitutionality of these sections at this late

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day. Under our system of jurisprudence, if there were no statute whatever on the subject, the finding of the jury in this case would be amply sufficient to warrant the judgment of the trial court.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ALEXANDER MCGAVOCK V. OMAHA NATIONAL BANK.

FILED APRIL 17, 1902. No. 11,189.

1. **Written Contract: INTERPRETATION.** In the interpretation of a written contract, when the meaning is doubtful, that construction will be preferred which gives effect to all parts of the instrument, rather than one which renders a portion of it redundant and useless.
2. **Surety: AGREEMENT CONSTRUED.** An agreement of a surety, in writing, dated May 19, 1893, that the creditor might extend time of payment on a note "pending the decision of the suit of George Canfield against Allen Rector, now in the supreme court of the state or for not over two years from this present date," held to authorize an extension during the pendency of *Canfield v. Rector* in this court, but no longer.

ERROR from the district court for Douglas county.
Tried below before SLABAUGH, J. *Reversed.*

Francis A. Brogan, for plaintiff in error.

Hall & McCulloch, contra.

SULLIVAN, C. J.

The judgment under review was rendered by the district court for Douglas county in an action brought by the Omaha National Bank, as payee of a note signed by George Canfield as principal, and L. M. Rheem and Alexander McGavock as sureties. McGavock contends that the

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judgment, which was in favor of the bank, is the result of a wrong construction of the following contract:

"Whereas, Alex. McGavock and L. M. Rheem are joint signers with George Canfield on one certain note payable to the Omaha National Bank, for three thousand dollars, dated Nov. 16, 1892, at six months, bearing interest at ten per cent. per annum from date, and on which interest has been paid to maturity, said note having arisen from various renewals of the note for same amount described in the agreement between said Canfield, McGavock and Rheem, bearing date Jan'y 29, 1890, securing said McGavock and Rheem against loss arising through signing said note: It is agreed by said McGavock and Rheem in order to avoid frequent signing of renewals, that said Canfield may from time to time pay interest in advance on said note of Nov. 16, 1892, for not over ninety-three days at one time, and have the same extended for such time, said McGavock and Rheem not to be released by such extension from their liability as it exists at this date.

"This agreement to hold good pending the decision of the suit of said George Canfield against Allen Rector, now in the supreme court of the state or for not over two years from this present date.

L. M. RHEEM.

"Omaha, May 19, 1893.

A. MCGAVOCK."

This agreement, in connection with the conceded fact that Canfield had recovered a judgment against Rector in an action which had been removed to this court, and was then pending here, discloses fully the circumstances under which it was made; it exhibits the whole environment of the transaction upon which we are to pass judgment. The case of Canfield against Rector was decided by this court May 15, 1894. 40 Nebr., 595. The decision was in favor of Canfield, and the amount due upon the judgment was soon afterwards collected, paid over to the bank, and indorsed upon its note. Afterwards, on September 17, 1894, the bank, for an adequate consideration, agreed with Canfield that as to the remainder of the note the time of

payment should be extended for ninety-three days. McGavock now claims that this extension was not authorized by the agreement above set out, and that it operated to release him from his contract of suretyship. In our opinion, this view of the matter is correct. The liability of a surety is not to be extended by implication; he is not to be bound beyond the terms of his contract. *Brennan v. Clark*, 29 Nebr., 385; *Curtin v. Atkinson*, 36 Nebr., 110; *Godfrey v. City of Beatrice*, 51 Nebr., 272. The construction to be given the language of a written agreement must, however, be fair and just, not forced or strained to support a theory favorable to the surety. The spirit and intent of the instrument must be regarded rather than the forms of expression. In determining the meaning of the contract here in question, we must consider the two clauses providing for extensions in their relation to each other and to the subject-matter. We must take into account the situation of the parties, and the end and object they were seeking to accomplish. In other words we should, in expounding the contract, put ourselves, as near as may be, in the situation of the contracting parties at the time the contract was made. We should not, without reason, assume that the bank officer who wrote the agreement did not possess ordinary skill in composition, or that he did not understand the meaning of the language he employed. Clearly, the object of the parties in making the agreement was to enable Canfield to collect the amount due upon the judgment against Rector and apply it on the note in favor of the bank. The reason for the extensions being the pendency of the error proceeding, it was quite natural that the parties should stipulate that the authority for making extensions should come to an end when the reason for making them should cease to exist. The language used to express this thought was, it seems to us, entirely appropriate. It is plainly stated that the authority to make extensions was not to hold good, under all circumstances, for two years, but only during the pendency of the case in this court, "or for not over two years." The last clause is

a limitation upon the first; it marks the boundary of the bank's right to grant extensions without releasing the sureties; and that is its only function. To adopt the construction for which the bank contends would be to condemn the first clause and strike it from the contract as a useless iteration—a mischievous pleonasm, which can hardly be accounted for on the theory that there was wanting in the mind of the scrivener a distinct conception of the idea which he was seeking to express. If it were the mutual intention of the parties to allow extensions to be made during a period of two years at all events, and without any regard whatever to the time when the *Rector Case* should be decided, it is difficult to understand why a plain expression of that intention should be complicated with matters having no necessary relation to it. Bearing in mind the reason for making the contract extending the time of payment, we can not think it at all probable that the parties deliberately set down in writing an irrelevant recital and a redundant stipulation. It is to be presumed that the capable business man who wrote the contract had two ideas which he adequately expressed, rather than that he gave one idea two forms of expression at the expense of labor and perspicuity. Read in the light of subsequent events, the contract, according to the bank's interpretation of it, was an agreement for extension until May 15, 1894, or for two years from May 19, 1893. This would seem to be an absurd contract, but it would be no more absurd now than it was in the beginning. Nothing could come out of it that it did not originally contain.

The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

OMAHA NATIONAL BANK, APPELLEE, v. WILLIAM S. SANDERS ET AL., APPELLANTS.

FILED APRIL 17, 1902. No. 11,332.

1. **Foreclosure: EXECUTION: SEVERAL WRITS: APPRAISEMENT: PRESUMPTION.** Where several writs were issued to the sheriff commanding him to execute a decree of foreclosure, the presumption is, nothing appearing to the contrary, that the appraisal under which the sale was made was valid.
2. **Conflicting Evidence.** This court will not disturb a finding of the district court based upon fairly conflicting evidence.

APPEAL from the district court for Douglas county.
Heard below before SCOTT, J. *Affirmed.*

John W. Cooper, for appellants.

Hall & McCulloch, contra.

SULLIVAN, C. J.

This is an appeal from an order confirming a judicial sale. The objection to the proceedings made in the court below, and insisted upon here, are: (1) That the property was sold under a second appraisal without having been twice advertised and twice offered for sale under the first appraisal; and (2) That the appraisal under which the sale was made was so low as to afford an inference of fraud.

With respect to the first objection, it is sufficient to say that the record does not show that there was more than one appraisal of the mortgaged property. Several writs were issued by the clerk of the district court commanding the sheriff to execute the decree of foreclosure, but what action, if any, was taken under them, does not appear. It will not be presumed that there were two appraisements, and that the second was lower than the first.

The second objection is also without merit. The appraisers fixed the value of the property at \$7,600, while two witnesses for appellant estimated it to be worth

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\$12,000. From this difference of opinion the trial court did not err in declining to infer that the appraisal was a fraudulent one.

The order of confirmation is

AFFIRMED.

FREMONT E. MUSFELT ET AL. V. STATE OF NEBRASKA.

FILED APRIL 17, 1902. No. 12,340.

1. Evidence: FORNICATION: SILENCE UNDER ACCUSATION. When, before prosecution, and while not under restraint, parties are accused of living together in a state of fornication, and make no denial, or are silent, this may be shown in evidence as an inculpatory circumstance to be weighed and considered by the jury in determining the truth of the charge preferred against them.
2. Conflicting Evidence. When the testimony is conflicting, and is fairly submitted to a jury, a new trial will not be granted if the testimony is sufficient to sustain the verdict. *Van Buren v. State*, 63 Nebr., 453.
3. Evidence. Evidence examined, and *held* sufficient to sustain a verdict of guilty.
4. Instructions: FORNICATION: OPEN AND NOTORIOUS COHABITATION. In a prosecution for the offense of living together in a state of fornication, it is not error to instruct the jury that it is not necessary the cohabitation charged in the complaint should be either open or notorious.
5. —: TENDER: ERROR. Where it is claimed an instruction which states no erroneous proposition of law is not sufficiently explicit, it is the duty of counsel to prepare and submit an instruction fully covering the point in issue, and which must be refused before error can be predicated on the court's action in giving the instruction complained of.
6. Impeaching Question. Record examined, and *held*, foundation for an impeaching question was laid with sufficient certainty, and that no error was committed in permitting the question to be answered over objection thereto.

ERROR from the district court for Rock county. Tried below before HARRINGTON, J. *Affirmed.*

R. R. Dickson and F. N. Morgan, for plaintiffs in error.

Frank N. Prout, Attorney General, and Norris Brown, Deputy, for the state.

HOLCOMB, J.

The defendants, each of whom was unmarried, were charged with the offense of living in a state of fornication, and on a trial of the charge the jury returned a verdict of guilty. Sentence was duly pronounced, and to secure a reversal of the judgment rendered against them they prosecute error.

It is first urged that the evidence introduced in support of the charge is insufficient to establish the offense for which they were prosecuted, or support the verdict of guilty as returned by the jury. A careful reading of all the testimony preserved in the bill of exceptions, and brought here for review, convinces us that the jury's finding can not rightfully be disturbed. There appears in the record sufficient competent evidence to sustain the verdict. Much of the testimony offered by the state and by the defendants, respectively, was of a most contradictory character; and manifestly the testimony of different witnesses on the one or the other side in respect of many matters material to the issue raised by the plea of not guilty, would have to be rejected in whole or in part by the jury, as unworthy of credence, and because in irreconcilable conflict. It was the especial province of the jury, as triers of fact, after hearing the witnesses testify, and observing their demeanor while on the witness stand, to sift the testimony submitted to them, rejecting that unworthy of belief, and from all the evidence ascertain the truth or untruth of the charge. There is in the record testimony, the competency of which can not be questioned, of more than one witness, which, if believed by the jury, established all material allegations of the information, and excluded every rational hypothesis save that of the guilt of the accused.

The unlawful act was charged to have extended over a period of time from October 10, 1899, to the 2d day of February, 1901. The prosecution was begun soon after the date last mentioned. The defendant Musfelt was a man of thirty-five years of age, and his co-defendant twenty-one or twenty-two. The latter had by her parents been given a good education, with the object in view of qualifying her for the profession of teaching; apparently at great sacrifice, because of their limited circumstances. She obtained a certificate and began to teach, and, soon after, her unlawful relations with Musfelt are alleged to have had their inception. She was unable, because of her loss of moral standing and character, to obtain a renewal of her certificate; and thereafter, according to the theory of the defense, she obtained employment in different families and at hotels, where she gained a livelihood, and during which time defendant Musfelt was courting her as an admirer and lover, and with a view to a future marriage, which, we are informed in the brief of counsel for defendant, has since conviction been consummated. She first found employment, if it may be said she was in fact employed by any one other than Musfelt, in a family who lived at the home of Musfelt, and where he also resided. Notwithstanding the protests and importunities of her parents, she persisted in remaining at defendant Musfelt's house, where, with some few interruptions she continued to make her home, first with one family and then another; until near the time the prosecution began. It is remarkable that her services were always required in a family which for the time being occupied the house owned by Musfelt, and in which he resided, and that only at such times would such family find it convenient or necessary to employ her. During the time covered by the information, four changes of families occurred in the home of Musfelt, and as often his codefendant changed families, by whom, according to the theory of the defendant, she was employed in the capacity of a servant girl or domestic.

It is fairly inferable from the record before us that the

different families occupying Musfelt's house were apparently in quite impoverished condition, without any permanent home, shifting from place to place wherever a temporary abode could be secured; and it is passing strange that the occasion to employ some one else to assist in their household duties, and the necessity therefor, only existed while making their home at Musfelt's, and ceased as soon as they departed therefrom. The theory of the defense is greatly shattered by many of the facts indisputably established by the evidence. The mother testifies that she visited her daughter at Musfelt's house, during the fall and winter of 1899 and 1900, twenty or more times, for the purpose of prevailing on her daughter to return home; that her daughter was keeping house for Musfelt; that at one time she was preparing a meal, and, by the plates, saucers and other table articles, the supper was being prepared for but the two; that the family then living in the house was occupying a separate room; and that, to all appearances, there were two families in the one house. These importunities and pleadings for the girl to return to her home were continued until, in frenzied anger, the mother seized an ax and threatened Musfelt with bodily injury, when she was forcibly ejected from the premises and ordered never to return. She testifies, and it is uncontradicted, that she repeatedly accused the defendants of living together in an unlawful state, to which they entered no denial, but remained silent. Not only were the actions of the parties and their relation to each other a proper subject for inquiry, and the introduction of evidence thereon, but their demeanor and conduct when accused, while not under restraint, as well as what they say, or their silence, may be shown in evidence as inculpatory circumstances to be weighed and considered by the jury in determining the truth of the charge preferred against them. *State v. Hill*, 36 S. W. Rep. [Mo.], 223; *Ettinger v. Commonwealth*, 98 Pa. St. 338.

Another witness, a girl of mature years, and whose testimony has the appearance of being disinterested, and

prompted solely by a desire to speak the truth, who was a member of one of the families residing in the house of Musfelt for a short time, testified that the family of which she was a member occupied the east room on the first floor of a four-roomed house, two of which were on the first floor, and two on the second; that the two defendants occupied the west room below for a living room, and the two rooms on the second floor for sleeping rooms; that the stairway leading from the first to the second floor was located in the west room, which was the only means of communication to the upper west room, through which a person passed in going to the east room up stairs; that the defendant Kitty Claus did the household work for her co-defendant, and tended to his stock when he was away. Much other evidence of a corroborative character was introduced, which it will serve no useful purpose to advert to in detail. At times the defendant Musfelt would send the girl away for a period of time, sometimes to a hotel, where she would find employment, and at other times to his relatives. The defendants undertake to excuse their actions on the ground that they were courting, and at the time of the trial were engaged to be married. It is altogether clear that their relations were not those of honorable regard and mutual admiration, when gauged by any recognized moral standard. It is hardly conceivable that the defendant Musfelt, had his intentions toward his codefendant been honorable, and his motives pure, would have subjected her to the scandal and suspicion naturally arising from their conduct as disclosed by the evidence. As heretofore stated, the testimony in many respects was flatly contradictory, and required of the jury discrimination in determining that which was worthy of belief and that which should be rejected as incredible; and with the conclusion reached we are bound, unless it appears the verdict is clearly wrong. The rule is that, when the testimony is conflicting and is fairly submitted to a jury, a new trial will not be granted if the testimony is sufficient to sustain the verdict. *Van Buren v. State*, 63 Nebr., 453.

The evidence, we are constrained to say, is sufficient to support the verdict, and the defendants' contention to the contrary can not be sustained.

Complaint is made of an instruction to the jury wherein they were told that it was not necessary the cohabitation charged in the complaint should be either open or notorious. We find no objection to the instruction. It follows the statute. The gist of the offense is the unlawful cohabitation,—that is, living together as man and wife while each was unmarried. If the accused lived together openly and notoriously as husband and wife, this would be proof positive of the violation of the law; but nevertheless the offense is committed when there is evidence sufficient to satisfy the minds of the jury that for any period of time covered by the information they cohabited together in a state of adultery,—whether it be for a week, month, year, or longer. It is not required by our statute that living in a state of fornication must be open and notorious in order to constitute the offense; hence there was no error in the giving of the instruction complained of.

Another instruction on the subject of circumstantial evidence is excepted to because, as contended, it was not stated with sufficient precision that the circumstantial evidence, in order to justify a conviction, must be such as to be consistent with guilt of the defendants of the offense charged, and inconsistent with any reasonable hypothesis of innocence. The instruction states no erroneous proposition of law. It is, as we understand counsel, admitted to be correct in so far as it extends. If the instruction was not deemed to be sufficiently explicit, it was the duty of counsel to submit and request the giving of one covering the point, and a failure to do so precludes the defendants from predicated error because of the court's action in that regard. *Gettinger v. State*, 13 Nebr., 308; *Pjarrou v. State*, 47 Nebr., 294.

Lastly it is contended that the foundation for an impeaching question was not sufficiently laid, and that error resulted in permitting the question to be asked over the

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objection of the defendant. The time of the conversation was given as the day preceding the one on which the question was asked, and the place laid in the town of Bassett, where the trial was being held. Bassett is only a small village, and the question, we think, directed the witness's attention to the particular place with sufficient certainty. Certainly she was not misled, nor could any prejudice result, because the location of the alleged conversation was not specified more definitely. There appears in the record no prejudicial error calling for a reversal of the judgment and sentence imposed on the defendants, and the same should be, and accordingly is,

AFFIRMED.

DAVID R. BUSH V. TECUMSEH NATIONAL BANK.

FILED APRIL 17, 1902. No. 10,926.

1. **Stipulations: RECORD.** Stipulations not embraced in the record, will not be considered.
2. **Transcript: PRESUMPTION.** It is conclusively presumed in this court that the duly certified transcript of the proceedings of the lower court contains everything that ought to be considered in determining the correctness of the ruling complained of.
3. **Judicial Notice: RECORDS OF DISTRICT COURT: AMENDED PETITION: STATUTE OF LIMITATIONS.** This court can not take judicial notice of the records of the district court, and when the record in this court shows that an amended petition was filed in the district court, but does not show that a new cause of action was set up in the amended petition, the statute of limitations will cease to run from the commencement of the action.

ERROR from the district court for Johnson county.
Tried below before STULL, J. *Reversed.*

J. W. Deweese and Lewis C. Chapman, for plaintiff in error.

Samuel P. Davidson and Frank M. Hall, contra.

SEDGWICK, J.

This action was begun in the district court for Johnson county by this plaintiff in error against this defendant in

error, the Tecumseh National Bank. Some time after the action was begun an amended petition was filed, seeking to recover \$6,000 and interest upon a certificate of deposit dated March 29, 1890, and issued by the bank of Russell & Holmes, of Tecumseh. To this amended petition an answer was filed, setting up several defenses that it is not now necessary to consider, and also pleading the statute of limitations. The reply was a general denial, together with other matters which are not now of importance. Upon the trial the defendant made the following objection: "The defendant objects to any evidence for the reason that this case is one of a series of cases which counsel on both sides stated on the trial of the case of *Buerstetta v. Tecumseh National Bank*, in the supreme court, that the facts in that case were the same as in the series; that that case would dispose of the whole series; for the further reason that the cause of action stated in the amended petition has been barred by the statute of limitations." This objection was sustained and the jury instructed to find a verdict for the defendant, to which exception was taken, and after judgment had been entered upon the verdict the cause was brought to this court upon petition in error.

It is insisted in the briefs herein that the objection was properly sustained upon two grounds: First, that there had been a stipulation made in a former case, by which this case was to be disposed of, and that under that stipulation there should have been a judgment in this case for the defendant; but, as there is nothing in the record showing that any such stipulation had been made by the parties, it will not be necessary to consider that suggestion any further.

The second ground upon which it is insisted that the objection was properly sustained is that the amended petition showed on its face that the action was barred by the statute of limitations. The time necessary to complete the bar of the statute expired after the commencement of this action, and before the filing of the amended petition upon which the action was tried. The original petition

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was lost from the files, and there is no transcript thereof in the record. Affidavits have been filed in this court attempting to show what the original petition contained; but these affidavits can not be considered, since the only method of bringing the records of a lower court to this court is by a transcript thereof. *Security Nat. Bank of Grand Island v. Latimer*, 51 Nebr., 498; *Moore v. Waterman*, 40 Nebr., 498; *Fulton v. Ryan*, 60 Nebr., 9. If a lost pleading is to be supplied, this should be done in the lower court, and the transcript should embrace the record as completed by that court.

The question in this case is whether the amended petition shows on its face that the action was barred by the statute of limitations. It is suggested that this petition states a different cause of action from that stated in the original petition, so that the filing of this amended petition was in effect the commencement of a new action, within the decision of this court in *Bucrstotta v. Tecumseh Nat. Bank*, 57 Nebr., 504, but that does not appear upon the face of the amended petition. No doubt, in determining that question the district court would take notice of the original petition, and it is insisted here that the court did take notice of the nature of the original petition, but in determining whether the court based its ruling upon a consideration of the allegations of the original petition and a comparison of those allegations with those of the amended petition, we must, as in all other questions, be governed by the record. *Chicago, R. I. & P. R. Co. v. Ringo*, 52 Nebr., 163. We can not take judicial notice of the records of the district court. We can only consider such records of that court as are shown by the transcript. *Thompson & Sons Mfg. Co. v. Nicholls*, 52 Nebr., 312; *Royal Trust Co. v. Exchange Bank*, 55 Nebr., 663. If, in order to support the decree of the trial court, we could presume the existence of some record of the district court not shown by the transcript here, there are few cases, under the existing practice, to which the rule would not apply, and require an affirmance of the judgment complained

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of. It is not proper practice to bring up a transcript of all of the records in a case, but only those parts that have some bearing upon the question presented. In most cases some parts of the records which have no such bearing are omitted. The practice upon suggestion of diminution of the record is liberal. It is the duty of appellee or defendant in error to see that those parts of the record which will justify the judgment or decree are shown by the transcript. This court will not presume that there was some different pleading in the lower court or some stipulation that would justify the judgment. We might with equal propriety presume that there was a confession of judgment in open court, or that an answer subsequent to its filing had been withdrawn, or any other act of defendant which would justify the judgment, or waive the error complained of. We can not indulge such presumptions in order to sustain the rulings of the trial court. The presumption that the transcript contains all of the record of the lower court which has any bearing upon the questions to be determined in this court is so strong as to control all conflicting presumptions. This is the only safe rule. It follows that the amended petition, upon its face, stated a cause of action, and the court erred in excluding the evidence.

The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

WILLIAM F. LAING, APPELLANT, V. ELEASER D. EVANS ET AL., APPELLEES.

FILED APRIL 17, 1902. No. 11,372.

Commissioner's opinion, Department No. 1.

1. Estoppel. An estoppel by representations does not arise, where there is no intention and could be no reasonable expectation, that such representation was to be acted upon.
2. Lease: AGENCY: MARRIED WOMAN: ESTOPPEL: NOTARY: LOAN.

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Making a lease as "authorized agent" for her husband by a married woman, in whose name title of record to the lands in question had stood for eight years, not such representation as estops her to claim title against the notary acknowledging the lease, who more than two years thereafter loaned money to the husband, supposing he owned the lands.

3. **Husband and Wife: CREDITORS.** Acts of a husband in leasing lands and taking notes to himself for rent, where the title of record remained all the time in the wife, do not show such ostensible ownership in him as to preclude her from claiming title against his creditors.
4. ———: ———: **ESTOPPEL.** A wife, who in 1881 procured her husband to buy from the state school land for her in his own name, who leaves the contract in his name until 1896, when the state is paid from proceeds of sale of part of the land, and deed made to her, and who has in the meantime permitted the husband to lease the land, take notes for rent in his own name, and manage it as his own, is estopped to claim, as against a creditor who has, with knowledge of such management, but with no actual knowledge of the contract, loaned the husband money in 1894 on the faith of his ownership of the land.

APPEAL from the district court for Douglas county.
Heard below before FAWCETT, J. *Affirmed in part.*

Howard B. Smith, for appellant.

F. L. Sumpter, Wilson & Brown and Crane & Crane, contra.

HASTINGS, C.

May 22, 1897, William F. Laing, plaintiff, commenced an action in Douglas county to subject 22½ acres of the west half of the northwest quarter of section 16-16-10, to the payment of a judgment of the district court of Lancaster county recovered by plaintiff against defendant E. D. Evans, May 28, 1896, for \$2,154.40, with interest and costs. It was also sought to subject to the same judgment the southwest quarter of said section 16, except 20.9 acres conveyed to L. D. Smith, and also the northwest quarter of the northwest quarter of section 21, township 16, range 10. The judgment above mentioned was rendered upon a promissory note dated July 23, 1895, which was itself a

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renewal of one originally made June 29, 1894, and executed by the defendant Evans, together with four other parties, in consideration of a loan. The southwest quarter of section 16 was acquired by purchase from the state in June, 1871. It was originally purchased in the name of E. D. Evans. In 1883 a deed of this land by the state of Nebraska to Mrs. Evans was made and recorded. July 10, 1890, Mr. Evans and his wife deeded to one L. D. Smith 20.9 acres of this land. The remainder still stands in the name of Mrs. Evans. March 24, 1881, Mr. Evans bought in his own name from the state the west half of the northwest quarter of the same section. This contract remained in his name until January 13, 1896, when it was assigned by her husband to Mrs. Evans, and a deed of the land made by the state to her and recorded. June 19, 1884, one Williams conveyed to Mrs. Evans, by deed then recorded, the northwest quarter of the northwest quarter of section 21, township 16, range 10. This is alleged to have been purchased and paid for by E. D. Evans and a conveyance made to Mrs. Evans for the purpose of defrauding his creditors. The claim of plaintiff is that all of this land was the property of E. D. Evans, and the ownership of the wife colorable merely, and held for his benefit. It is also claimed that by her holding her husband out as the owner, and by leaving him in control of the property, and by acquiescing in his claim of ownership, the wife has estopped herself from claiming to own the land as against the plaintiff. The loan is alleged to have been made on the credit of the husband's ownership of all this land. The wife answered, denying the incurring of the indebtedness to plaintiff and the recovery of his judgment; admitted her relationship to E. D. Evans; denied that he was the owner of the contract with the state for the west half of the northwest quarter of section 16 on June 29, 1894, or afterwards, but claimed ownership herself; admitted the sale of 57½ acres of the land to Merriwether, and says that it was sold in good faith long before the incurring of any indebtedness to plaintiff. She de-

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nies that any of the premises were paid for by E. D. Evans, but says the consideration was paid by herself. She says that the lands, from the time of their purchase from the state and from Williams until the removal of the family to Lincoln, in 1891, were not in her husband's possession, but in her own, except in so far as he lived with her upon them and assisted in working them, and that any control, renting, or collecting of the rents for the premises, exercised by him at any time, was as her agent. It is now conceded that E. D. Evans was one of the signers of the note executed June 29, 1894, to the plaintiff for \$2,725, and that judgment was rendered upon a renewal of that note, as claimed by plaintiff, and execution returned "No property," and that the judgment remains unpaid. The questions arising in the case are as to the ownership of the three portions of land, and whether or not Elizabeth Evans is estopped from claiming title to them.

In 1885 E. D. Evans seems to have recovered a judgment in his own name for trespass and injury to timber on this land. After 1890 the leases of the land seem to have been generally made out by E. D. Evans in his own name. In 1892 Mrs. Evans seems to have executed a lease to Chas. Parson as the agent of E. D. Evans, and to have signed the lease in that way. The rents seem generally to have been paid to Mr. Evans, and the notes for the rent seem to have been generally drawn in his favor. From 1871 to 1891 the family lived on the premises and cultivated them together. The plaintiff testified that he drew up a lease to one Parson of this land in the name of E. D. Evans in 1892 at the request of Mrs. Evans, and it was drawn in that form by her instruction, and that her signature to the lease as agent of her husband was in his presence. The school land contracts of purchase were made in the name of E. D. Evans, but deeds to Elizabeth L. Evans, as stated. The intervening payments are stated by Mrs. Evans to have been usually made by her husband at her instance, and with her money derived from the farm. There is evidence of statements made by Mr. Evans that the lands

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were put in Mrs. Evans's name because of some old judgments growing out of an unfortunate mercantile venture of his in 1870. Plaintiff swears that he loaned the money in the belief that E. D. Evans was the owner of the lands, and on the faith of such ownership of the property, and would not have loaned the money if he had not believed that the lands belonged to E. D. Evans, and he also testifies that his belief of such ownership grew in part out of the instructions he had received from Mrs. Evans in making the lease to Parson in 1892, as well as out of the instructions he had received from Mr. Evans, and his knowledge of the control and management of the lands by him from 1881 to 1896. He had had no business relations with Mrs. Evans except the making of the Parson lease. He testified also to a conversation with Mrs. Evans, in which she said she knew of the intention of borrowing the money for which the original note was given. He also testified that the money was borrowed for the use of the Bethany Manufacturing Company. Plaintiff was a money loaner, and required the names of at least E. D. Evans and T. J. Oliver to the note before he would loan the money. Defendant Elizabeth Evans testified that when she was married in 1860 she received from her father a mare and colt; that five years later, when she removed with her husband to a homestead in Douglas county, Nebraska, she took some horses with her grown from this mare; that five years later her husband traded the homestead and stock upon it for a stock of goods in Elkhorn, Nebraska, and that in 1871, when that business was closed out, she received \$300 for the horses; that with this the first payment was made on the school land in 1871; that the family immediately removed upon this land, and she obtained a pair of mules from her father to work it, and subsequently received \$75 more from her father to pay the overdue interest to the state. She also testified that she paid the interest and taxes and made the final payment, and had a deed taken out to herself in 1883, and filed it of record; that she bought and paid for the land conveyed to her by Williams

in 1884, the northwest quarter of the northwest quarter of section 21; that she paid \$200 down, and gave her note for \$400, and that the money for both payments came out of her previously owned farm; the west half of the northwest quarter of section 16, she testifies was purchased by her husband for her and with her money; that she paid the lessee, one Willis, \$50 to surrender his lease. She also testified that the final payment for the west half of the northwest quarter of section 16 was made out of the proceeds of a sale of $57\frac{1}{2}$ acres of the same land to one Merriwether.

Plaintiff's case seems to rest upon the propositions that the real ownership of the lands was in E. D. Evans, and also that Mrs. Evans was estopped by her action in making a lease of the land as her husband's agent to Parson, and in leaving the control and management to her husband, from asserting her ownership under the deeds to her. So far as the question of estoppel is concerned it seems clear that plaintiff neither alleges nor proves enough to make out a case except, perhaps, as to the remaining $22\frac{1}{2}$ acres of the west half of the northwest quarter of section 16-16-10 east. To create an estoppel by representations some action upon them must be contemplated by the parties, or must naturally be expected to be taken by the person deceived. Such person also must have taken reasonable precautions himself. No intention to mislead plaintiff, or any one else having a right to know, as to the ownership of these lands, appears. Plaintiff's testimony as to admissions made by Mrs. Evans that she knew beforehand of the borrowing of this money is met by her positive denial of all such knowledge. Her statement is corroborated by that of T. J. Oliver, and by the circumstances. It seems clear that nothing of the kind was in contemplation in 1892 when the Parson lease was made. A mere statement that her husband was the owner of the land, made to one who was not expected nor intended to take any action upon such statements, and made in the face of the fact that her deeds were of record, can not be

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held to prevent her claiming the lands. Neither does it seem that the finding of the trial court was wrong as to the actual ownership of the tract conveyed to Mrs. Evans by the state in 1883, nor of that embraced in the deed to her from Williams in 1884. She had at least a color of right in these lands and the placing of them in her name by recorded deeds must be held to outweigh, in determining their actual ownership, the part which her husband took in managing them.

The serious question arises as to the $22\frac{1}{2}$ acres of the west half of the northwest quarter of section 16, which was not conveyed to Merriwether. Mrs. Evans testified that she was ill at the time of its purchase in 1881, and that she had her husband buy it for her; that about four years later she sold the $57\frac{1}{2}$ acres north of the Rawhide to her son. The latter in 1891 sold this tract to Robert Merriwether for \$1,500, and Merriwether, as a part of the consideration, paid her \$300, and to the state the remainder of the purchase price of the entire 80 acres. This was done and deed obtained in 1896. At the time of this loan and its renewal the contract for the entire 80 acres stood in the name of E. D. Evans. Merriwether is not a party to the action, and does not testify. No complaint is made that his part in the transaction was not in good faith. The other $22\frac{1}{2}$ acres, however, which are claimed by Mrs. Evans, it is insisted should be subjected to the payment of this note. Assuming, as we must, that the trial court believed the woman's statement that the husband purchased this land for her, and that the lower court was justified in accepting such statement, in connection with her son's, that he bought from her the $57\frac{1}{2}$ acres which were subsequently conveyed to Merriwether, the question then presented is whether, after leaving this land in her husband's name during the years from 1881 to 1896, and after the plaintiff's loan had been made upon the credit of the husband's ownership, she can now be heard to deny such ownership. In *Roy v. McPherson*, 11 Nebr., 197, the wife in 1864 purchased lands through her brother

with funds from her father's estate, and title, contrary to her directions, was made to her husband. She, however, permitted it to remain so till 1878. It was held that her rights in the land were subject to that of her husband's creditors, who had in the meantime trusted him upon faith of his apparent ownership. The wife was presumed to have known that he would be likely to obtain credit by reason of his ostensible ownership. *McGovern v. Knox*, 21 Ohio St., 547, is cited to the same effect. To the same effect is *Besson v. Eveland*, 26 N. J. Eq., 468. In *Goldsmith v. Fuller*, 30 Nebr., 563, the doctrine is reasserted, though the case is held to fall outside the rule, because the proof did not clearly show either that the husband was permitted to deal with the property as his own, or that credit was extended on the faith of his ownership. In *Early v. Wilson*, 31 Nebr., 458, the same rule was held in a replevin suit to apply, and the wife was denied a recovery of her personal property where she had knowingly permitted her husband to act as ostensible owner and he had so obtained credit. In *Swartz v. McClelland*, 31 Nebr., 646, property on which the husband and wife lived, and which was bought with her money, was held subject to her husband's debts contracted while the title stood in his name. "Honesty and fair dealing require that where the wife permits her husband to use her money or property as his own, incur obligations upon the faith that the property belongs to him, that as against such creditors their rights are superior to hers." In *Brownell v. Stoddard*, 42 Nebr., 177, the same doctrine is reaffirmed, though the case is held to fail to show that credit was extended on the faith of the husband's apparent ownership. *Cleghorn v. Obernalte*, 53 Nebr., 687, is cited by defendant as a parallel case to the present one, but is distinguished by the fact that the court declares there is not a particle of testimony to show that credit was extended because of belief in the husband's ownership. The same is true of *Mosher v. Neff*, 33 Nebr., 770, and *Hews v. Kenney*, 43 Nebr., 815. In *Cleghorn v. Obernalte*, it is true that the

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court adds, as a further distinction, that when the debt was contracted the land was held under a contract, and the legal title was in the vendor. Such was the case here also, but in this case there were numerous acts of ownership in addition to the fact that the contract with the state was in the husband's name. It does not seem that the acts of ownership were sufficient to overcome the presumptive notice from the records of the deeds to Mrs. Evans. They do, however, appear to fully justify the belief that the $22\frac{1}{2}$ acres were actually the property of Mr. Evans. It is true that plaintiff had no actual knowledge, so far as appears, as to this contract with the state, but it does not seem that he should be held chargeable with laches for not making an investigation which would only have confirmed his error as to the ownership. It is concluded therefore that the action of the trial court in refusing to disturb the deeds of 1883 and 1884 should be affirmed, but that as to the $22\frac{1}{2}$ acres in the west half of the northwest quarter of section 16-16-10 east, not conveyed to Merriwether, the decree should be reversed and the cause remanded, with directions to enter a decree for the sale of that $22\frac{1}{2}$ acres, the proceeds to be applied upon plaintiff's judgment.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the findings and decree of the trial court, so far as the same relate to the southwest quarter of section 16-16-10 east and to the northwest quarter of the northwest quarter of section 21-16-10 east be affirmed, and so far as they relate to the west half of the northwest quarter of said section 16, that said findings and decree be reversed, and that said cause be remanded to the district court of Douglas county, with instructions to enter a decree for plaintiff as prayed as to the $22\frac{1}{2}$ acres of said last-named premises not conveyed to Robert Merriwether.

JUDGMENT ACCORDINGLY.

W. E. HEWIT ET AL. V. BANK OF INDIAN TERRITORY.*

FILED APRIL 17, 1902. No. 11,582.

Commissioner's opinion, Department No. 1.

1. **Petition: VAGUE TERMS: LAW OF OKLAHOMA: TWELVE PER CENT. INTEREST: DATE OF NOTE.** Where petition, in vague terms and by reference to note, alleges that twelve per cent. per annum is a lawful rate of interest by statutes of Oklahoma and note sued on bears date in Oklahoma and interest at twelve per cent. per annum, and such allegation is denied, *held* not error to refuse opening and closing to defendants, who plead usury but admit execution and delivery of note.
2. **General Denial: EVIDENCE.** Such allegation is sufficient, on a general denial, to admit evidence of Oklahoma statute.
3. **Pre-existing Debt: OKLAHOMA CONTRACT: PROOF.** Proof that the note in question was given for a pre-existing debt contracted and due in Oklahoma, is relevant as tending to establish an Oklahoma contract.
4. **Evidence.** Evidence *held* to support a verdict for plaintiff.
5. —: **INSTRUCTION.** Evidence *held* to support instruction that twelve per cent. per annum is a lawful rate of interest in Oklahoma.
6. **Conditions of Payment: EVIDENCE: INSTRUCTION.** Where there is no evidence of any compliance with conditions of a payment made by a third party, not error to instruct jury that defendants, to entitle themselves to credit for such payment, must show it was unconditional.
7. **Refusal of Instruction.** Not error to refuse an instruction that if note was sent from Nebraska it must be governed in its provisions and effect by Nebraska laws.

ERROR from the district court for Butler county. Tried below before BATES, J. *Affirmed.*

Hastings & Hall, for plaintiffs in error.

C. H. Aldrich, *contra.*

HASTINGS, C.

Forty-nine assignments of error are made in this case, but only those urged in the brief of plaintiffs in error,

*Rehearing allowed. See opinion on page 468.

who were defendants below, and will be hereafter referred to as defendants, need be considered. Those are, first, that they were improperly denied the right to open and close at the trial; second, the admission in evidence of certain acts of Oklahoma relating to the rate of interest established by law in that territory; third, the permitting of certain questions on cross-examination as to the consideration of the note sued on; fourth, that the verdict is not supported by sufficient evidence,—(a) that there was no competent evidence that the Oklahoma statute allows twelve per cent. interest, (b) that the evidence showed that defendants were entitled to a credit of \$110.67 and it was not allowed them; fifth, that the evidence did not warrant an instruction that the Oklahoma rate of interest is, or may be by special contract, twelve per cent. per annum; sixth, that it was error to instruct the jury that to entitle the defendants to a credit for the \$110.67 claimed, it must have been unconditionally deposited with the plaintiff bank; seventh, that the trial court erred in refusing to instruct that Oklahoma laws as to interest were to be presumed to be the same as Nebraska's in the absence of proof; eighth, that the trial court erred in refusing an instruction that the contract should be governed by the laws of the place from which the acceptance of it was dispatched; and ninth, that the trial court erred in refusing an instruction that the statute pleaded in the reply had no application to this note.

Plaintiff's petition was upon a promissory note for \$300, dated at Guthrie, Oklahoma, June 15, 1895, payable August 23, 1895, on which interest had been indorsed as paid up to February 9, 1898. The rate of interest provided on the face of the note was twelve per cent. per annum, and a copy of the note was in the petition. Following this was the following paragraph:

"That said note was executed and delivered at Guthrie, Oklahoma Territory, in accordance with and under and by virtue of the territorial laws of Oklahoma; that said money was contracted for and had and received and paid over to

the defendants by the plaintiff in accordance with the statutes of the said territory, made and provided for in such cases, and that said law provides that under and by virtue of special contract that the rate of interest mentioned and described in said note was the legal rate of interest in said territory at the date of said contract."

The answer admitted plaintiff's incorporation, the making and delivery of the note and the payment of \$3 on its principal, denied paragraph three above, alleged usurious agreement for twelve per cent. per annum interest, the payment of \$88.50 as interest and \$110.67 on the note March 10, 1898.

The first error, in refusing to defendants the opening and closing, is claimed because, as defendants assert, paragraph three above pleads no fact but only legal conclusions. This seems to be a mistake. The note is set out and shows on its face a rate of twelve per cent. per annum interest. Paragraph three alleges that the note was an Oklahoma contract and that the laws of that territory at that date made it a legal rate by special contract. Possibly defendants might have been entitled to a direct statement of what the law in terms provided rather than this indirect statement through a reference to the note that the law provided for twelve per cent. per annum by special contract. No motion for a more specific statement, however, was made. A general denial was filed, and after judgment this form of statement will be sufficient. As the petition showed a note bearing twelve per cent interest on its face and payments of more than \$90, there could be no recovery for so much of the principal, nor for any interest nor costs, if no proof was adduced. The denial of this paragraph therefore rendered proof necessary to establish plaintiff's cause of action on this note. Without this there could be a recovery only on another ground, the loan admitted in the answer. The action of the trial court, therefore, in refusing to defendant the opening and closing seems not to have been erroneous.

The second error seems to be disposed of substantially

in the first. The allegations of paragraph three of the petition, challenged only by a general denial, were sufficient to warrant the introduction of evidence as to the interest laws of Oklahoma. The complaint that it does not appear that the copy of the laws of Oklahoma, which was introduced, purported to be published by the authority of the territory, is not well founded. The offer recites that it purported to be so published and the objection is not on that ground. It is on the ground that the authentication was insufficient and that the petition was an insufficient pleading of such facts. There was no question raised that the book did not purport to be published by authority and the objection was rightly overruled.

The third complaint, that cross-examination as to the consideration of the note was permitted and was wholly irrelevant, as not being in dispute, does not seem to be any better taken. It is hard to see how this was prejudicial or could have been. In any event the court could not tell beforehand how important the answers might be to a correct conclusion as to whether or not this was an Oklahoma contract rather than a Nebraska one. No motion to strike out the testimony as to the consideration was made and the fact that the note, though given after defendant's removal to Nebraska, was to get money to take up an indebtedness existing in Oklahoma, does not seem entirely irrelevant to the question as to the location of the contract.

The objection that the verdict is contrary to the evidence as to usury does not seem well taken. U. C. Guss, plaintiff's president, testified that the permitted rate of interest in Oklahoma territory was at that time twelve per cent. per annum. The statute introduced and appearing on page 76 of the bill of exceptions provides that when a rate of interest is specified in a contract it shall continue until payment but shall in no case exceed twelve per cent. per annum. It is true that this statute is headed "Interest on Judgments," but the effect of the whole is certainly to show a different law from that of Nebraska. The same

act seems to repeal the general interest law of the territory. If defendants wanted protection from an Oklahoma usury law as against this note they should have produced the law after this showing by plaintiff.

The complaint as to the non-allowance in the verdict of the alleged payment of \$110.67 seems, at most, only a case of an adverse finding on conflicting evidence. Plaintiff's president says that this \$110.67 was deposited in the bank by F. W. Hewit as a final payment on some partnership transactions with defendant, W. E. Hewit, and was to be held until a receipt in full should be received from W. E. Hewit to F. W. Hewit on account of the transactions; that subsequently F. E. Hewit demanded the money and as the receipt had not been received from defendant it was turned back. After this and after W. E. Hewit had been notified of it, he says the latter sent the receipt, but it was then too late to hold the money. W. E. Hewit disputes one of these statements, but the jury were warranted in finding them substantially true and that there was no obligation to hold this money or right of the bank to apply it on defendant's note.

The fifth claim that the evidence did not warrant the court's instruction that the laws of Oklahoma allowed twelve per cent. per annum and that no usury was to be found in this note if they found it was an Oklahoma contract, need not be further discussed. The evidence of plaintiff on this point has been considered competent and sufficient and none was tendered by defendants.

The sixth complaint that the trial court erred in telling the jury, as in substance was done in the 9th instruction, that the defendants must, to entitle them to the \$110.67 credit, show an unconditional deposit of the money by F. W. Hewit for that purpose, is not well founded. Defendants might claim that the president's letter of February 25, 1898, was proof of an unconditional deposit. They could not claim that the evidence tended to prove any compliance with the alleged conditions before the money was withdrawn. It was therefore no error to give an instruc-

tion withdrawing from the jury this question as to compliance with the conditions. The receipt was not sent until October, 1898, and the money had then long been withdrawn. There is no contradiction of the testimony that it was procured back within sixty days on defendants refusing to accept conditions.

The seventh complaint has been disposed of in considering the fifth one.

The eighth complaint, as to a refusal to instruct that if the note was sent from Nebraska the laws of Nebraska would govern seems to call for no discussion. The trial court's instruction that the law which was contemplated by the parties at the time as governing the contract was to control, was at least as favorable as defendants were entitled to. *Teal v. Walker*, 111 U. S., 242; *Cromwell v. Sac County*, 96 U. S., 51.

The objection that the court refused an instruction that the statute pleaded in the reply, which has been heretofore discussed, had no application to this note, and that the jury should find the rate of twelve per cent. per annum usurious, needs no further consideration.

The questions really raised in this case are as to the competency of the pleading and proofs of the Oklahoma statute, as to what law governs this contract and as to the fact of payment of the \$110.67. The first seems to have been correctly determined by the court and the two latter by the jury.

It is recommended that the judgment be affirmed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated above, the judgment of the district court is

AFFIRMED.

December 3, 1902, the following opinion on rehearing was filed:

1. **Foreign Law: Proof.** A book purporting to contain the written laws of a foreign jurisdiction, proves itself, and is admissible as evidence without other authentication.

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2. ———: ———: DECLARATION OF COUNSEL. But the authenticity of a volume which it is claimed contains the statutes of a foreign state or territory, can not be established by the mere declaration of counsel as to what the volume is.
3. ———: ———: APPROPRIATE EVIDENCE. The appropriate evidence of the written laws of a foreign state or territory, is that prescribed by section 905, Revised Statutes U. S., and by sections 419 and 420 of the Code of Civil Procedure.

SULLIVAN, C. J.

This was an action by the Bank of Indian Territory against W. E. and Christie Hewit upon a promissory note. The jury found in favor of plaintiff for the full amount of its claim, and judgment followed the verdict. An opinion affirming this judgment was handed down last term and will be found in 64 Nebr., 463.

The motion for a rehearing suggested a doubt as to the correctness of our decision upon one point. As shown by the former opinion the statute law of Oklahoma territory on the subject of interest was a material averment of the petition and was one of the issues which plaintiff was required to establish by proof. The proof offered, consisting of extracts from books said to contain the written laws of the territory, was held to be admissible, and was, over defendants' objections, read to the jury. To show precisely what transpired we here copy from the bill of exceptions:

"The plaintiff now offers to read in evidence that portion of Exhibit 'B,' Exhibit 'B' being the session laws of Oklahoma territory for the year 1895, and incorporating the laws passed at the third regular session of the legislative session of the territory of Oklahoma, and authenticated by the duly elected, acting and qualified secretary of said territory, which is found at page 93 thereof, the same being chapter 14 on said page of said Exhibit 'B.' The defendants object to the offer as incompetent, immaterial and irrelevant and not sufficient foundation laid for its introduction in evidence, it not having been shown that said law sought to be introduced in evidence was passed by the legislature of the territory of Oklahoma or that it

is a law passed by the territory of Oklahoma, or that Exhibit 'B' which contains the law sought to be introduced in evidence is authenticated as required by the laws of said territory or by the laws of the state of Nebraska. * * * Objection overruled. Defendants except. The plaintiff further offers in evidence section 2 of said Exhibit 'B' the same being found at page 93 of said exhibit and being the continuing and final section of said chapter 14 of said exhibit as found at page 93. The defendants object to said introduction as incompetent, irrelevant and immaterial and * * * for the further reason that said statute has not been authenticated as required by law and no sufficient foundation laid for its introduction in evidence. Objection overruled. Defendants except. Plaintiff read in evidence sections 1 and 2 of article 1 of chapter 14, at page 93 of the session laws of the territory of Oklahoma, same being Exhibit 'B' or a part thereof, a copy of which is hereto attached at page 76. * * * The plaintiff now offers in evidence that portion of Exhibit 'B' which is found at page 94 and so much of said page as is included in chapter 14 entitled 'Article 2, Legal Rate of Interest.' The defendants object to the offer for the reason that it is incompetent, immaterial, irrelevant, * * and no foundation laid for the introduction in evidence, the section referred to not having been authenticated as required by the laws of Oklahoma. * * * Objection overruled. Defendants except. Article 2, Legal Rate of Interest, chapter 14, same being a portion of Exhibit 'B' and found at page 94 of said exhibit read in evidence by the attorney for the plaintiff and a copy of same is hereto attached at page 77. The plaintiff now offers in evidence that portion of Exhibit 'T' said Exhibit 'T' being the compiled statutes of the territory of Oklahoma for the year 1893 being duly and legally authenticated as appears in said exhibit by the secretary of said territory at that time, that portion of said Exhibit 'T' found at page 223 in article 6, entitled 'Loan of Money', including section 7 of chapter 16, also in said chapter and

article sections 8, 9, and 11. The defendants object to the offer of the plaintiff for the reason that the law sought to be introduced in evidence has not been properly authenticated * * * and for the further reason that it is incompetent, immaterial and irrelevant and no sufficient foundation laid for its introduction in evidence. Objection overruled. Defendants except. Sections 7, 8, 9, and 11 of article 6 entitled 'Loan of Money,' chapter 16, of Exhibit 'T' same being the compiled statutes of the territory of Oklahoma are read in evidence by the attorney for the plaintiff and a copy of same is hereto attached at page 94."

The matters embraced within the last two offers seem to have no material bearing upon the case and there was, perhaps, no prejudice resulting from their admission. But the evidence received under the first offer was material and the action of the court in permitting it to go to the jury was, we think, reversible error. The grounds of defendants' objection were clearly stated, and they were, according to the adjudged cases, sufficient to exclude the alleged copy of the Oklahoma law fixing the contract rate of interest at 12 per cent. Where a statute of a sister state, or of one of the territories, is to be proved the proof must conform to the act of congress (U. S. Revised Statutes, sec. 905) or else to the provisions of our own statute.

It is not claimed that either Exhibit B or Exhibit T was authenticated in the manner prescribed by the federal statute, but it is insisted that both exhibits purported to have been published under the authority of the territory of Oklahoma, and were therefore admissible as evidence under section 419 of the Code of Civil Procedure. The bill of exceptions contains all the evidence given at the trial, but in it we find no proof that the books described as the "Session Laws of Oklahoma Territory" and the "Compiled Statutes of Oklahoma Territory" purported to have been published under the authority of the government of that territory. The title pages were not put in evidence, and there is in the record nothing, except the

statement of counsel, to suggest the idea that the volumes were printed by public authority. A book purporting to contain the written laws of a foreign jurisdiction proves itself, and is admissible as evidence without other authentication (*Young v. Bank of Alexandria*, 4 Cranch [U. S.], *384; *State v. Abbey*, 29 Vt., 60; *Eagan v. Connelly*, 107 Ill., 458; *Clanton v. Barnes*, 50 Ala., 260; *Goodwin v. Provident Savings Life Assurance Society*, 66 N. W. Rep. [Ia.], 157), but its authenticity can not be established by the mere statement of counsel as to what it is. The recent case of *Union P. R. Co. v. Buzicka*, 65 Nebr., —, is conclusive upon this point.

There being in the record no legal evidence of the law of Oklahoma on the subject of interest the judgment heretofore rendered in this court is set aside, and the judgment of the district court reversed.

REVERSED AND REMANDED.

CHRISTINA FRAAMAN, APPELLEE, v. SWAN N. FRAAMAN,
APPELLANT.

FILED APRIL 17, 1902. No. 11,417.

Commissioner's opinion, Department No. 1.

1. **District Court: JURISDICTION: COLLATERAL ATTACK.** Where a district court has acquired jurisdiction, it has the right to decide every question which arises in the case, and its orders and judgments, however erroneous, can not be collaterally assailed. Such errors can only be taken advantage of by proceedings in error or appeal to this court.
2. **Judgment for Alimony: LIEN ON HOMESTEAD.** A judgment for alimony in favor of a wife, rendered in an action for divorce against the husband, is a lien upon the family homestead, the title whereof is in the husband. *Best v. Zutavern*, 53 Nebr., 604, followed.
3. **Judicial Sale: JUDGMENT DEBTOR'S INTEREST: APPRAISERS.** Where appraisers have been appointed to fix the value of the judgment debtor's interest in land, for the purpose of judicial sale, they have no power, under section 491b of the Code, to deduct or apportion, according to area, liens upon an entire tract for

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the purpose of determining the judgment debtor's interest in a distinct parcel of the entire tract.

4. **Execution Sale:** **ADJOURNMENT:** **CODE.** There is no provision of the Code authorizing an adjournment of an execution sale.

APPEAL from the district court for Buffalo county.
Heard below before SULLIVAN, J. *Reversed.*

Frank E. Beeman, for appellant.

Macfarland & May and *J. M. Easterling*, *contra.*

DAY, C.

On April 5, 1898, in the district court for Douglas county, the appellee obtained a decree of divorce from appellant and a judgment for alimony in the sum of \$650,—\$500 for herself and \$150 as an attorney's fee. A transcript of this judgment was filed in the office of the clerk of the district court for Buffalo county, and an execution issued thereon and levied upon certain real estate of the appellant. The premises were appraised, advertised for sale and sold, and the sale confirmed. From the order confirming the sale the appellant brings the case to this court by appeal.

A number of objections, both to the appraisal and the confirmation of the sale were urged, and, as some of them may again arise in the further proceedings of this case, we deem it proper to pass upon them now.

The first objection to the confirmation was that the decree which formed the basis of the sale was a nullity. This contention is based upon the fact that the appellant was not permitted to defend or introduce any evidence in his behalf upon the trial because he had failed to comply with the order of the court requiring him to pay temporary alimony and attorney's fees. Whatever might be the views of this court upon the question thus sought to be raised, had an appeal or error been taken from the judgment of the lower court, it seems clear to us that this question can not now be raised by an objection to the sale. If it was an error of the trial court, advantage of it could

only be taken by a direct proceeding by error or appeal to this court. The rule is well settled that, where a court has acquired jurisdiction, it has the right to decide every question which arises in the case, and its judgment, however erroneous, can not be collaterally assailed. If the appellant felt himself aggrieved by the ruling and orders of the trial court and desired to have them reviewed by this court, he had a plain and adequate remedy by an appeal or error proceeding. He did, in fact, appeal to this court, but dismissed his appeal before the case was reached in its order.

The next objection urged is that the property sought to be sold is the homestead of the appellant. The testimony tends to show that appellant and one of his minor children were occupying the premises as a home. The testimony as to the homestead character of the premises is not very clear. But granting that it were sufficiently established, still the objection would not be good. This court has held in *Best v. Zutavern*, 53 Nebr., 604, that a judgment for alimony in favor of the wife, rendered in an action for divorce, is a lien on the family homestead, the title whereof is in the husband. Chief Justice SULLIVAN, the writer of that opinion, says: "The husband's right to an exempt homestead can not, we think, be asserted against the wife who has been forced by his aggression to leave his domicile, and who, in an action for divorce, has obtained a judgment for alimony against him. The homestead law is a family shield and can not be employed by either spouse to wrong the other. The supreme court of Kansas, under a statute which authorized the court upon granting a divorce to award the wife such share of the husband's real or personal estate as shall be just and reasonable, held that the court has power to award the wife possession of the family homestead, the title of which is in him. (*Brandon v. Brandon*, 14 Kan., 342.) And, in a later case, it was decided by the same court that a decree which was declared to be a lien on all the husband's realty was a valid lien on the family homestead. (*Blankenship v.*

Blankenship, 19 Kan., 159.) The logic of these decisions is that exemption statutes are not designed to protect the husband against the wife's claim for alimony. To the same effect are the cases of *Mahoney v. Mahoney*, 59 Minn., 347, 61 N. W. Rep., 334, and *Daniels v. Morris*, 54 Ia., 369."

An objection was urged to the appraisement, and particularly to the manner in which the appraisers arrived at the value of appellant's interest in the land. The levy was made upon 160 acres described in three tracts, as follows: "West half of the northeast quarter and the southeast quarter of the northeast quarter and the northeast quarter of the northeast quarter of section 13," etc. The certificates of liens furnished by the register of deeds and the county treasurer pursuant to the request of the sheriff showed two mortgages and some unpaid taxes upon the whole quarter section. In determining the value of appellant's interest in the west half of said quarter section, the appraisers deducted from the gross valuation of said west half an amount equal to one-half the face value of the two mortgages and taxes. The same method was followed with reference to the two forty-acre tracts in the east half of said quarter section. In other words, the appraisers apportioned the several liens upon the three parcels of land levied upon in proportion to area. The only authority the appraisers have for deducting prior liens is that given by section 491b of the Code of Civil Procedure, which provides that the appraisers "shall deduct from the real value of the lands and tenements levied on, the amount of all liens and incumbrances for taxes or otherwise, prior to the lien of the judgment under which execution is levied, and to be determined as hereinafter provided, and which liens and incumbrances shall be specifically enumerated, and the sum thereafter remaining shall be the real value of the interest therein of the person, or persons, or corporation against whom or which the execution is levied." This authority to deduct the amount of all liens does not confer the right on the appraisers to deduct a part of the liens, or apportion them upon the sev-

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eral parcels of the entire tract. We think the action of the appraisers in apportioning the liens for the purpose of determining the value of appellant's interest was beyond their power.

Another objection to the confirmation was that the sale was duly advertised to be made on September 26, 1899, at 10 o'clock, but the return shows that it was made on September 27, 1899, at 10 o'clock. There is nothing in the record showing an adjournment of the sale, if, indeed, an adjournment could properly be made, and no order of the court was entered with reference thereto. It appears in the briefs that the sale was not made on account of the pending of an injunction, which on September 26 had not been finally determined. There are no statutory provisions for an adjournment of an execution sale either by the court or the sheriff. Section 497 of the Code expressly provides that lands and tenements taken upon execution shall not be sold until the officer causes public notice to be given of the time and place of sale, at least thirty days before the date of sale, and further provides that "all sales made without such advertisement shall be set aside." These provisions of the statute are mandatory, and must be complied with. When the sale did not take place on the 26th, as provided in the notice, it should have been re-advertised.

There are a number of other objections urged in the briefs of counsel for appellant, but as they are not likely to occur upon a reappraisement and sale of the property they will not be considered.

We therefore recommend that the judgment of confirmation and the appraisement be set aside, and the cause remanded for further proceedings.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of confirmation and the appraisement is set aside, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

**E. R. GODFREY & SONS COMPANY V. CITIZENS' NATIONAL
BANK OF NORFOLK.**

FILED APRIL 17, 1902. No. 10,652.

Commissioner's opinion, Department No. 1.

1. **Chattel Mortgage: RECORD: CONFLICTING EVIDENCE: CREDITORS: QUESTION FOR JURY.** Where a chattel mortgage is kept from record for a period of sixteen months, and the evidence is conflicting as to whether it was done by agreement between the parties, and rights of creditors have intervened between the execution and filing of the mortgage, the question of the validity of the mortgage as to such creditors, in a replevin action brought by the mortgagees, is a question of fact for the jury.
2. ———: **QUESTION FOR JURY.** Where a creditor takes possession of a stock of merchandise, claiming an agreement between himself and the debtor by which the latter turned the goods over as a pledge of personal property to secure the amount due, and there is evidence tending to show that the creditor took possession by virtue of a chattel mortgage, the character of the creditor's possession is for the determination of the jury.
3. **Mortgage: STOCK OF MERCHANDISE.** A mortgage upon a stock of merchandise under the general description attaches only to such merchandise as was in stock when the mortgage was executed, and not to stock afterwards added by purchase.
4. **Evidence: DIRECTING VERDICT.** Evidence examined and held not to warrant a peremptory instruction directing the jury to return a verdict for plaintiff below.

ERROR from the district court for Madison county.
Tried below before ROBINSON, J. *Reversed.*

Mapes & Hazen, for plaintiff in error.

George L. Whitham, Allen & Reed and Smith & Smyth,
contra.

KIRKPATRICK, C.

This is a replevin action tried in the district court of Madison county on March 16, 1898. Defendant in error, the Citizens' National Bank of Norfolk, in its petition filed in the case, claimed to have a special interest in cer-

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tain personal property, describing it, on account of a chattel mortgage executed and delivered to it by the Norfolk, Nebraska, Produce Company, and also that it was entitled to the possession of the goods as pledgee, the Norfolk, Nebraska, Produce Company having turned the property over into its possession with permission to sell for the satisfaction of the amount due the bank from the produce company. Joseph J. Clements, the sheriff of Madison county, took possession of the personal property for which the replevin action was brought under an execution issued upon a judgment against the produce company in favor of E. R. Godfrey & Sons Company, plaintiff in error. In the district court, before trial, by agreement of all parties, the execution creditor, E. R. Godfrey & Sons Company, was substituted as party defendant in place of the sheriff, and all proceedings thereafter had were between plaintiff in error and defendant in error herein. After the introduction of testimony in the case, at the request of defendant in error the court instructed the jury to return a verdict in its favor, which was done, and judgment entered on the verdict. A motion for a new trial was overruled, and the case is brought to this court for review upon error proceedings.

Many assignments of error are made in the motion for a new trial, and in the petition in error, all of which will not require consideration. It is contended by defendant in error that the assignments in the petition in error are not sufficiently definite and certain to present any question for the consideration of this court. It may be said, however, that the petition in error sufficiently presents two questions: First, the ruling of the court upon the motion filed by plaintiff in error asking for a dismissal of the action on the ground that the affidavit in replevin was void; and, second, that the court erred in directing a verdict for defendant in error, plaintiff below.

Regarding the first question, it may be said that the affidavit in replevin was signed by the president of defendant in error bank, and was sworn to before George L.

Whitham, a notary public, who was the attorney for the bank in the replevin proceedings. Plaintiff in error in the district court filed a motion asking the court to dismiss the action for the reason that the affidavit filed was sworn to before the attorney of record for defendant in error. While this affidavit was probably voidable, it was clearly not void, and it would have been erroneous for the trial court to have sustained the motion to dismiss the action upon this ground. Had plaintiff in error limited its motion to quashing the affidavit, or asked the court for an order requiring defendant in error to file an amended affidavit, it is probable that the motion would have received consideration at the hands of the trial court. The question of the right of an attorney in a case to swear a client to an affidavit for a provisional remedy such as that in the case at bar was considered by this court in the case of *Horkey v. Kendall*, 53 Nebr., 522, in which it is said that an affidavit to procure an attachment taken before a notary public who is also attorney for one of the parties, is merely irregular, and not a nullity, and can not be collaterally attacked. We are unable to find merit in this contention of plaintiff in error.

The next contention is that the court erred in directing a verdict for defendant in error. A determination of this question requires a consideration of the evidence offered on the trial. The facts disclosed by the record are briefly as follows: The Norfolk, Nebraska, Produce Company was organized as a corporation, and was engaged in the general produce business at Norfolk. The company kept a cold storage warehouse, and bought and sold butter, eggs and other perishable goods in large quantities. Prior to May, 1895, it was indebted to the Citizens' National Bank of Norfolk in a large sum. This indebtedness had been reduced by part payments, until in May or June of 1895 the indebtedness was \$1,600, represented by two promissory notes, one for \$1,000 and the other for \$600, due in ninety and sixty days, respectively. These two notes were secured by a chattel mortgage, which does not appear in the record.

On October 11, 1895, there was a renewal of the notes in a like amount, and a new mortgage was given to secure said notes and renewals thereof, covering several thousand egg-cases, fillers for egg-cases, several thousand pounds of butter and cheese, and several hundred cases of eggs, as well as other personal property. This mortgage was not put upon record until the 13th day of February, 1897. In the meantime there had been many renewals of the notes, and the indebtedness had been reduced to \$1,490. On that date, and during this time, the produce company had sold and replaced many times all the goods described in the mortgage except some office chairs and fixtures of inconsiderable value. In the fall of 1896, some four months before the mortgage was placed of record, plaintiff in error sold to the produce company two car-loads of apples, for which the company agreed to pay; the purchase price for the apples, with accrued interest, on March 2, 1897, being \$635.49. About the 12th day of February, 1897, the bank seems to have become convinced that the produce company was in failing circumstances, and on that day the president of the bank went to some of the officers of the produce company, the president of the produce company being at the time absent, and insisted upon the indebtedness being paid. The produce company being unable to pay the amount due, agreed to turn over to the bank its stock of goods. Whether the agreement was to turn over only the goods described in the mortgage or all the goods on hand is a subject of conflict in the evidence. The secretary and vice-president of the company went with the president of the bank to the attorney for the bank, who wrote on the back of the chattel mortgage dated October 11, 1895, a memorandum as follows: "Feb. 12th, 1897. The mortgagor herein consents that the Citizens' National Bank, mortgagee herein, may sell the goods taken this day by virtue of and described in this mortgage at private sale. Norfolk Neb. Prod. Co. F. L. Eastabrook, Sec.; F. R. Dexter, V. P." The bank, by its attorney and agent, immediately took possession of the stock of goods of the pro-

duce company, and posted a notice on the building that it had taken possession of the goods as mortgagee. Among the goods taken at this time were the two car-loads of apples which plaintiff in error had shipped to the produce company. The evidence discloses that plaintiff in error had no knowledge of the existence of the chattel mortgage given October 11, 1895, and a member of the company testified that they would not have extended credit to the produce company had they known of the existence of the mortgage. The testimony also shows that all of the egg cases, egg-case fillers, etc., in stock and taken possession of by the bank, were bought long subsequent to the execution of the mortgage in question, and no part of the property originally mortgaged appears to have been in existence at this time except a small part of the office furniture and other fixtures. The president of the produce company testified positively that at the time the first mortgage was given, in May or June, 1895, it was agreed between the bank and the officers of the produce company that the chattel mortgage then given, and all renewals of the same, should not be placed of record by the bank; and that the produce company should have the right to sell any and all of the property described in the mortgage in the usual course of business, and replace the same from time to time with new stock. This agreement is denied by some of the officers of the bank, and by at least one of the officers of the produce company. In February, 1897, plaintiff in error instituted an action in the county court of Madison county, and recovered a judgment in the amount due it for the apples sold. The sheriff levied an execution upon the property, which was subsequently taken away from him in this replevin action by the bank. When the bank, on March 13, 1897, took possession of the stock of goods, it put the secretary of the produce company in charge as its agent, who proceeded to sell the goods, and realized from their sale some \$1,200 or \$1,300, leaving a balance due the bank after expenses paid of more than \$400. The value of the property replevied was agreed upon at the trial.

The question requiring consideration is whether, under this state of facts, the court erred in peremptorily instructing the jury to return a verdict for defendant in error. It appears from the evidence, first, that the mortgage was withheld from record for a period of sixteen months; second, that the plaintiff in error extended credit to the produce company during the time intervening between the execution and recording of the mortgage. If this chattel mortgage was kept from the record in pursuance of an agreement between the mortgagor and mortgagee, and if, in consequence of its absence from the record, plaintiff in error extended credit to the mortgagor which it would not otherwise have extended, then, under the rule announced and adhered to by this court, the mortgage was null and void as against plaintiff in error. *Ackerman v. Ackerman*, 50 Nebr., 54. To authorize an instruction to find for defendant in error, the evidence must be of such a character that reasonable minds could not differ as to the conclusion to be drawn therefrom. Can it be said from the record that there was not sufficient evidence to support a finding of the jury that the mortgage was withheld from the record in order to permit the mortgagor to secure credit which it could not otherwise have obtained, and that plaintiff in error did sell two car-loads of apples to the mortgagor relying upon the non-existence of this mortgage? R. A. Stewart, an officer of the bank, testified as follows:

"As I understood it, if we had filed this mortgage and taken the property under it,—the mortgage was not good to us when filed unless we did take the property, for it was a business they were selling goods out of all the time. Had we done that, we would have either to close them out, or we would have our mortgage. It would have been no use to do it; and as long as we had security that we considered amply good, and they seemed to be doing a profitable business, of course we didn't close them up.

Q. And they understood this?

A. Yes, sir.

Q. And you knew also that, had that mortgage been placed on file, and you not take possession, you knew they wouldn't have gotten any credit to do business?

A. I presume, if the mortgage had been placed on file, and we hadn't done anything under it, the mortgage would have been comparatively useless."

The president of the produce company, as already indicated, testified positively that an agreement did exist between his company and the bank that the mortgage, originally given and those given in renewal thereof were to be kept from record. In view of the nature of the business transacted by the produce company, the conflict of the evidence as to the agreement permitting a continued sale and replacement of the bulk of the goods described in the mortgage, and the undisputed evidence of plaintiff in error that credit would not have been given had it known of the existence of the mortgage, as well as the evidence above quoted, it was certainly for the jury to say whether this chattel mortgage was void as against plaintiff in error, and this question should have been submitted to them for their determination.

There seems to be another valid reason why the action of the trial court was wrong. It clearly appears from the evidence that none of the property taken by the bank from the produce company was in existence at the time of the execution of this mortgage except some furniture and office fixtures of small value. There can be no doubt that property not in existence at the time the mortgage was executed, and which was purchased at a subsequent date, was not covered by the mortgage in question. *Tolerton & Stetson Co. v. First Nat. Bank of Wayne*, 63 Nebr., 674.

Defendant in error seeks to avoid the force of the objections heretofore mentioned by claiming that it not only took possession of the goods as mortgagee, but that the goods were pledged to it as security for the payment of the debt, and that it also took possession of the goods as pledgee, and was so in possession at the time the sheriff made the levy under the execution for plaintiff in error.

Murray v. Schneider.

Whether defendant in error can sustain its right to the possession of the goods upon the theory that it was pledgee may well be questioned in the face of the memorandum on the back of the mortgage, heretofore quoted, and in the face of the question whether or not the produce company, by action of its proper officers, pledged the goods in question to the bank. The most that can be said for the contention of defendant in error in this regard is that the nature of its possession of the goods was itself a question which should have been submitted to the jury under proper instructions. Whether the possession of the bank was that of a pledgee or mortgagee, the correct determination of this case does not require us to decide, and that question is not decided. From what has been said it is clear that the action of the trial court in instructing the jury for defendant in error was wrong, and it can not be sustained. It is therefore recommended that the judgment of the district court be reversed and the cause remanded.

HASTINGS and DAY, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMAS MURRAY V. HERMAN SCHNEIDER ET AL.

FILED APRIL 17, 1902. No. 11,501.

Commissioner's opinion, Department No. 2.

Instruction: ISSUE: EVIDENCE. Instruction complained of examined, and held to properly define the law upon the issue made by the pleadings, and to be applicable to the evidence given upon the trial. The instruction as given is therefore approved.

ERROR from the district court for Douglas county.
Tried below before KEYSOR, J. *Affirmed.*

I. J. Dunn, for plaintiff in error.

J. O. Detweiler and Martin Langdon, contra.

BARNES, C.

On the 4th day of September, 1897, Thomas Murray, plaintiff in error, filed his petition in the district court for Douglas county against Herman Schneider, John Stave, William Schneider and August Schneider, to recover the sum of \$254.84, with interest, upon a certain promissory note given by the said defendants to the plaintiff on February 19, 1891. This petition was in the usual form. In answer thereto Herman Schneider admitted the execution and delivery of the promissory note, and alleged that on or about the 18th day of December, 1891, Thomas Murray purchased of and from the defendant Herman Schneider certain personal property amounting to the sum of \$247.10; that it was agreed by and between himself and the said Murray that this sum was to be credited upon the note in question; that he had paid the balance of the note and that there was nothing due from him to the said plaintiff,—and prayed that the action be dismissed at plaintiff's cost. The other defendants answered to the same effect, but alleged that they signed the note as security for the defendant Herman Schneider. They also alleged that the plaintiff, Thomas Murray, purchased the personal property mentioned in the answer of Herman Schneider, and agreed with them that the proceeds of this property, amounting to \$247.10, should be applied upon the note in suit; that there was a further payment of \$7.94 in cash, together with the interest; and they therefore denied that there was anything further due upon the note, and alleged that the same was fully paid and settled. To these answers the plaintiff filed a reply in the form of a general denial, which contained a further allegation admitting that the property mentioned in said answers was purchased by him, but that he applied the proceeds thereof to the payment of other debts of the defendant Herman Schneider. On these issues a trial was had to a

jury, and after the introduction of the evidence and the giving of the instructions by the court, the jury returned a verdict against the defendants for the sum of \$66.60,—it thereby appearing that on the question of the agreement to apply the proceeds of the sale of the personal property to the payment of a portion of the note in question, the jury found for the defendants; that on the question as to whether the balance of the note had been paid or not, their finding must have been for the plaintiff. A motion for a new trial was filed and overruled, and thereupon judgment was rendered in favor of the plaintiff upon the verdict for \$66.60. From this judgment the plaintiff brings the case to this court by petition in error.

In the brief of plaintiff in error but one assignment is urged upon our attention, which is that the court erred in giving instruction No. 2, on his own motion, to the jury. This instruction is as follows:

“2. The court instructs the jury as a matter of law, that a debtor has a right in paying money or transferring property to a creditor in satisfaction of his debts, to whom several and distinct debts are due; to direct to which indebtedness such a payment or transfer of property shall operate as a credit, and the creditor is bound to allow the credit for said payment or transfer of property as directed by the debtor. And should you find from a preponderance of all the evidence that the defendant, Herman Schneider, directed the plaintiff, Thomas Murray, to credit all purchases of property made at such Herman Schneider's sale upon the note herein in controversy, and should you further find that property was purchased thereat by said Thomas Murray, you are further instructed that the amount of said purchases of property are to be allowed upon said note even though you should find from a consideration of the evidence that said plaintiff did in fact credit the same upon other notes of defendant, Herman Schneider, and you are to allow all amounts of such purchases that you may find to have been so made herein as a credit upon the note in controversy.”

Plaintiff contends that the above instruction is bad for two reasons: First, because it leaves out the essential proposition that the debtor must give the direction as to the credit at or before the time the payment is made, or at least before the creditor has applied the amount upon some other indebtedness which is then due; second, that the instruction does not state any issue made by the pleadings, as the pleadings are stated to the jury by the court.

We can not agree with the plaintiff in error upon his first contention. The instruction, considered according to the plain import of its language, means that the direction as to where the credit should be applied must have been given at the time of the purchase, or at the time of the agreement to purchase the property. It can not be distorted so as to mean anything else. Notice the language: "The court instructs the jury as a matter of law, that a debtor has a right in paying money or transferring property to a creditor in satisfaction of his debts, to whom several and distinct debts are due; to direct to which indebtedness such a payment or transfer of property shall operate as a credit." This certainly means that the direction was given, and must have been given, at the time of the payment or of the transfer of the property. No other time is mentioned, and no other time can be inferred by this language. Again, an examination of the evidence discloses that there was testimony to sustain the allegation that at and before the time of the purchase of the property at the sale, the matter had been talked over between Herman Schneider, the other defendants, and the plaintiff, Murray; and it was understood and agreed that the credit should be placed upon the note in suit. In fact there is no evidence in the record which shows that there was any agreement or direction at any other time. As to the second contention, it seems to us that the instruction covers the case made by the pleadings and the evidence completely. We are unable to see how it could have been worded differently and have been applicable to the pleadings and the facts disclosed by the evidence.

Stevens v. Paulsen.

This instruction meets with our approval, and the court, in giving it, did not err. As this is the only proposition contended for by the plaintiff in error in his brief, all the other matters will be considered waived, and we recommend that the judgment of the district court be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

TRUMAN E. STEVENS, APPELLEE, v. ANNA C. PAULSEN ET AL., APPELLEES, IMPEADED WITH OMAHA LOAN & TRUST COMPANY ET AL., APPELLANTS.

FILED APRIL 17, 1902. No. 11,563.

Commissioner's opinion, Department No. 2.

1. Statute of Limitations: TAX LIEN. The statute of limitations does not run against a tax lien until five years after the right of action has accrued thereon.
2. County Treasurer: NOTICE OF TAX SALE: CONTENTS. Section 109, chapter 77, Compiled Statutes, requires the county treasurer, in his notice of a tax sale, to give a list of the land to be sold and the amount of the taxes due thereon, but does not require the treasurer to include in the notice the amount of the interest due on the taxes up to the day of the sale.

APPEAL from the district court for Douglas county.
Heard below before FAWCETT, J. *Affirmed.*

F. A. Brogan and Crofoot & Scott, for appellants.

W. A. Saunders and A. C. Wakeley, contra.

OLDHAM, C.

This was an action to foreclose certain tax liens upon two parcels of land in Douglas county, Nebraska,—one in section 30 and the other in section 31, township 15, range 13. There were numerous defendants in the court below,

but only two of them—The Omaha Loan & Trust Company and the Boston Safe Deposit & Trust Company—have appealed from the judgment of foreclosure rendered by the district court. The Boston Safe Deposit & Trust Company pleaded the statute of limitations in its answer, claiming that more than five years had elapsed from the date of the tax certificate before it was made a party defendant to the action in the court below. Its answer, however, disclosed the fact that less than five years had elapsed from the time that plaintiff's right of action had accrued upon the tax certificates before it was made a party defendant to the action; hence the court below followed a long and unbroken line of decisions of this court in overruling its plea of the statute of limitations.

The Omaha Loan & Trust Company makes no complaint of the decree of foreclosure rendered by the trial court on the parcel of land situated in section 30, but complains of so much of the decision of the district court on the parcel of land situated in section 31 as allowed the plaintiff the amount of the tax with interest at twenty per cent. to the time of entering the decree and also an attorney's fee of ten per cent. of the amount of the lien. This objection is based on the fact that in the treasurer's published notice of the tax sale the amount set opposite the description of this property as the amount of the taxes due was \$137.50, whereas the amount due at the time of sale was \$144.85. This difference arose from the fact that the treasurer, in making out the sale notice, did not compute interest up to the date of the sale, but inserted the original amount of the tax, without interest. It is contended that because of this defect no valid public sale of this property for taxes was ever held, and therefore there could be no valid private sale, and that the purchaser, by the payment of his bid, was simply subrogated to the rights of the county for the enforcement of his lien for the amount which he has paid, with interest at ten per cent. per annum. Section 109, chapter 77 of the Compiled Statutes, contains, among other things, the following: "The notice shall contain a

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notification that all lands, on which the taxes of the preceding year, naming it, remain unpaid, will be sold, and the time and place of the sale and said notice must contain a list of the land to be sold, and the amount of taxes due thereon." As this section of the statute provides that the treasurer may adjourn the sale from day to day until all the lands or lots or blocks have been offered, it would be impossible for him in his published notice to estimate the exact amount of the tax and interest up to the date of the sale, as he would be unable to determine in advance what particular day any particular tract might be offered, and it would seem to be a fair inference that the statute is satisfied by a statement of the amount of all the tax levied; the interest being merely a matter of computation to be made when the land is sold. We think that this view of the statute is in harmony with the doctrine announced by this court in the case of *Stegeman v. Faulkner*, 42 Nebr., 53.

It would then follow that the trial court was right in holding that the public and private sale of the parcel of land in dispute was valid and that the judgment should be affirmed, and we so recommend.

BARNES and POUND, CC., concur.

By the Court: For the reasons set forth in the foregoing opinion, the judgment of the district court is

AFFIRMED.

BERNARD THURMAN, APPELLEE, V. CITY OF OMAHA ET AL.,
APPELLANTS.

FILED APRIL 17, 1902. No. 11,464.

Commissioner's opinion, Department No. 2.

1. **Contract of Sale: APPROVAL OF PURCHASER.** If a contract of sale is expressly made subject to the approval of the purchaser, or of someone for him, and such approval involves either judgment in matters of taste or personal opinion, the person whose

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approval is required is made the sole arbiter, and his decision is conclusive, provided he really passes upon the question and reaches a conclusion honestly, whether his conclusion is right or wrong.

2. ———: ———: **OPINION OF ATTORNEY: TITLE.** Where a party stipulates that his contract of purchase shall be subject to the opinion of his attorney as to the title to or legal status of the thing to be purchased, the plain purpose being to make his act dependent upon the personal opinion of his legal adviser, the sole requirement is that such legal adviser in fact pass upon the subject and give his honest opinion, and the merits of an honest opinion actually given are not subject to review.
3. **Contract for Labor: OPINION MUST BE REASONABLE.** The cases in which the courts insist that the opinion or decision must be reasonable and well founded, as well as honest, are those in which the contract is for performance of labor in lines not necessarily involving personal taste and opinion, so that any competent person could arrive at a satisfactory determination.
4. **Contract: OPINION OF PURCHASER'S LEGAL ADVISER: PATENT PRETENSE.** In case a contract makes the opinion of the purchaser's legal adviser conclusive, the opinion rendered may be so unreasonable as to be evidence in itself that it is not honest; but before such conclusion can be deduced from the face of the opinion alone, it must be so grossly and palpably at variance with plain principles of law as of itself to compel the conclusion that it is a mere pretense.

APPEAL from the district court for Douglas county.
Heard below before FAWCETT, J. *Affirmed.*

W. J. Connell, for appellants.

Greene, Breckenridge & Kinsler and Isaac E. Congdon,
contra.

POUND, C.

The city of Omaha, defendant and appellant herein, advertised for bids for certain bonds which it was about to negotiate. The plaintiff was one of several bidders, pursuant to the advertisement, and the bonds were awarded to him. His bid contained an express condition in these words: "subject to our attorney's opinion as to the legality of the issue." After plaintiff had been notified of the action of the city officers upon his bid, he declined to take the bonds,

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for the expressed reason that his attorney did not approve the issue, and considered it invalid. Subsequently he brought this suit for cancelation of a certified check, which had been turned over to the city with his bid, as a deposit thereon, in accordance with requirements of the competition. The city denied that he refused to accept the bonds because of the opinion of his attorney, and claimed that the pretended opinion was incorrect and unreasonable, and that it was not a bona-fide opinion, but the result of fraud and collusion, without any actual or honest determination of the question. The district court found for the plaintiff and rendered a decree accordingly, from which the city prosecutes this appeal.

There is not much difference between counsel for the respective parties as to the rules of law by which this appeal must be governed. But the importance of exact understanding and definition of those rules in such a case requires us to examine them with care. In some cases where the obligation of one of the parties is made dependent upon his approval of the subject of the contract, or upon the approval of some designated person, it is implied that such approval be given whenever the facts are such as to lead the trier of fact to the conclusion that it ought to have been given, and if the trier of fact so concludes, disapproval or failure to approve by the party to whom the matter is left in the contract may not be availed of. In other cases the opinion or decision of the person designated in the contract is conclusive, and his pronouncement will not be reviewed, if he actually and honestly exercises his judgment and states his opinion. The nature of the contract and the character of the required decision or opinion must determine to which class a given cause is to be referred. Contracts of purchase and sale are usually of the latter class, and contracts of any sort are, as a rule, to be put in that class where the approval stipulated for involves either judgment in matters of taste or the personal opinion of one chosen for some special and peculiar reason. Where questions of taste and personal judgment

are involved, as in contracts to make clothes to order, or for producing works of art, such as busts or portraits, it is generally held that the person whose opinion is stipulated for is the absolute judge. *Brown v. Foster*, 113 Mass., 136; *Zaleski v. Clark*, 44 Conn., 218; *Gibson v. Cranage*, 39 Mich., 49; *Hoffman v. Gallaher*, 6 Daly [N. Y.], 42. Even in such cases, however, the dissatisfaction or disapproval must be actual, and not a mere pretext. The person to whose judgment the matter is left must actually and honestly exercise his judgment and express a real opinion. *Silsby Mfg. Co. v. Town of Chico*, 24 Fed. Rep., 893; *Exhaust Ventilator Co. v. Chicago, M. & St. P. R. Co.*, 66 Wis., 218, 28 N. W. Rep., 343. But contracts of the sort last described are not the only ones in which the bona-fide judgment of the person named will not be reviewed. If a contract of sale of something already existing is expressly made subject to the approval of the purchaser, or of some one for him, and such approval involves personal judgment or opinion, the person whose judgment is required is made the sole arbiter, and his decision is conclusive, provided he really passes upon the question and reaches a conclusion honestly, whether his conclusion is right or wrong. The parties have stipulated for his opinion, not for the decision of a judge or jury, and there is no such reason for reviewing the opinion as in a different class of cases hereinafter referred to. In fact justice requires that the party who has sought to protect himself by such a stipulation be afforded the protection intended. *Wood Reaping & Mowing Machine Co. v. Smith*, 50 Mich., 565, 15 N. W. Rep., 906; *Ellis v. Mortimer*, 1 B. & P. [N. R. Eng.] 257; *Gray v. Central R. Co.*, 11 Hun [N. Y.], 70; *Campbell Printing-Press Co. v. Thorp*, 36 Fed. Rep., 414; *Singerly v. Thayer*, 108 Pa. St., 291, 2 Atl. Rep., 230. Another variety of cases presents something of each of those already considered. In these cases a purchaser stipulates that his contract of purchase shall be subject to the opinion of his attorney as to the title to or legal status of the thing purchased, and the plain purpose is to make his

act dependent upon the personal opinion of his legal adviser. Here there is not only a contract of sale, as distinguished from one for performance of labor, but the required decision involves personal judgment in a matter resting more or less in opinion. Accordingly the sole requirement is that such legal adviser in fact pass upon the subject and give his honest opinion, and the merits of an honest opinion, actually given, are not subject to review. *Church v. Shanklin*, 95 Cal., 626, 30 Pac. Rep., 789; *Hudson v. Buck*, 7 Ch. Div. [Eng.], 683. If the opinion in such cases is the result of fraud, collusion or undue influence, of course it is not the opinion contemplated by the contract. But if it is free from any such vice, it must be decisive. The cases in which the courts insist that the opinion or decision must be reasonable and well founded, as well as honest, are those in which the contract is for performance of labor in lines not necessarily involving personal taste and opinion, so that any competent person could arrive at a satisfactory determination. *Wood Reaping & Mowing Machine Co. v. Smith*, *supra*; *Doll v. Noble*, 116 N. Y., 230, 22 N. E. Rep., 406; *Keeler v. Clifford*, 165 Ill., 544, 46 N. E. Rep., 248; *Bentley v. Davidson*, 74 Wis., 420, 43 N. W. Rep., 139.

In case the contract makes the opinion of the purchaser's legal adviser conclusive, and the vendor claims that an opinion given under such provision and relied upon by the purchaser is fraudulent, collusive or a mere pretense, it is obvious that the burden is upon him to establish such claim. *Wendt v. Vogel*, 87 Wis., 462, 58 N. W. Rep., 764. Fraud is not presumed, and, though it may be inferred from circumstances, "such inference must not be guess-work or conjecture, but the rational and logical deduction from the circumstances proved." *Alter v. Bank of Stockham*, 53 Nebr., 223. In the same case the court say: "If, from the entire evidence on the subject, good faith or an honest mistake even may be as rationally and reasonably inferred as fraud, then the law leans to the side of innocence." Undoubtedly the opinion rendered may be

so unreasonable as to be evidence in itself that it is not honest. But before such conclusion can be deduced from the face of the opinion alone it must be so grossly and palpably at variance with plain principles of law as of itself to compel the conclusion that it is a mere pretense. In the case at bar, plaintiff consulted an attorney who had an office in the same building, and obtained his opinion. The attorney in question represented plaintiff in taking testimony in this cause, and testified that, while he had no general retainer from plaintiff, so far as he knew he was doing all the plaintiff's legal business. He states that the papers relating to the bonds, a copy of the city charter, statements as to the bonded and other indebtedness of the city and the assessed valuation of taxable property therein, together with the history of the issue in question, were submitted to him and carefully examined, and that after examining them he gave an oral opinion against the bonds, which was subsequently reduced to writing. He was subjected to a protracted and severe cross-examination, from which it appeared that he was a young man, of no long experience in the profession, but trained at a law school of high standing, and possessed of as much experience and practice as might well be expected under the circumstances. The plaintiff did not agree to procure the opinion of some lawyer of note and established reputation, possibly at considerable cost. He stipulated for the opinion of his own lawyer, whom he employed in his other business. So long as he actually procured the opinion of that lawyer, without fraud or collusion, he did all that his contract required. The qualifications and experience of the legal adviser whom he chose to do his business were for him to consider, and are not material to the present controversy. We do not say that the standing and qualifications of the lawyer whose opinion is taken in such a case might not be a circumstance to indicate bad faith and collusion. But in the case at bar the evidence shows that the attorney to whom the bonds were submitted was at that time the regular legal adviser of the plaintiff, and that he examined the

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papers and gave what he believed to be a sound opinion. He appears from his testimony to be a well-educated, honorable and conscientious man. Although the issue was very likely valid in all respects, there was much in the papers he examined that might well cause a lawyer to hesitate. His client desired an investment, not a lawsuit, and it is no evidence of bad faith that he may have exercised a somewhat excessive caution. The papers submitted to him showed that the assessed valuation had suddenly almost doubled, and yet the amount which the city could raise by taxation had been reduced; that coupons on prior issues were unpaid; and that a very large item of uncollected taxes stood among the city's assets. These facts, the significance of which is apparent to us here, might well excite suspicion and create alarm elsewhere. We can not say that the opinion rendered is so grossly or palpably unreasonable as to require us to pronounce it a mere sham, and we think the finding of the trial court entirely justified.

It is recommended that the decree appealed from be affirmed.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons set forth in the foregoing opinion, the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. GRANT S. COBB, v. JACOB FAWCETT, JUDGE.

FILED APRIL 17, 1902. No. 12,467.

Commissioner's opinion, Department No. 2.

1. **Bill of Exceptions: JUDICIAL NOTICE.** A bill of exceptions may properly include a record of events which took place in the presence of or under the direction of the court and matters of which the court took judicial notice, if in fact considered by the court in arriving at a decision, although not formally introduced in evidence.

2. ———: ———: REVIEW: APPEAL: REJECTION OF IMPROPER EVIDENCE. If any matter of which a trial court takes judicial notice in coming to a decision is incompetent, irrelevant or otherwise improper to be considered, this court, in hearing the cause on appeal, will reject it and put it out of the way in considering whether the order complained of is sustained by sufficient evidence.
3. ———: MANDAMUS: PLAIN AND ADEQUATE REMEDY IN THE ORDINARY COURSE OF LAW. A party who complains that a trial judge has incorporated incompetent, irrelevant or improper matter in a bill of exceptions by way of amendment on the ground that he took judicial notice thereof at the hearing, has a "plain and adequate remedy in the ordinary course of the law," within the purview of section 646, Code of Civil Procedure, by obtaining a review of the action of the judge in considering the matter complained of.

ORIGINAL application for a writ of mandamus to compel the settling of a bill of exceptions. Rehearing of case reported in 63 Nebr., 523. *Former judgment vacated. Writ denied.*

Brome & Burnett, Virgil O. Strickler and J. H. McIntosh, for relator.

Ralph W. Breckenridge, contra.

POUND, C.

The facts are stated in the former opinion. *State v. Fawcett*, 63 Nebr., 523. It is said in that opinion that "the office of a bill of exceptions is to exhibit to the appellate court those portions of the public proceedings at the trial which the complaining party deems material for the appellate court's consideration, and which would otherwise not go into the record." Such was the office of the bill of exceptions at common law, where either party might have any number of separate bills of exceptions relating to particular rulings as a trial progressed. But under our practice the scope of a bill of exceptions has been enlarged materially. This is necessary in actions at law by reason of the power of this court to pass on assignments of error that verdicts and judgments are contrary to or not sup-

ported by the evidence. It is even more necessary under our equity practice, wherein all the evidence considered by the trial court is brought to this court on appeal by bill of exceptions, instead of being transcribed and transmitted directly. Code of Civil Procedure, sec. 676. In suits in equity the bill of exceptions provided for by the Code is intended to bring before the appellate court everything which was before the trial court and was considered by that court in making its findings and rendering its order or decree. Hence it would seem clear that a bill of exceptions may properly include a record of events which took place in the presence of or under the direction of the court and matters of which the court took judicial notice, if in fact considered by the court in arriving at a decision, although not formally introduced in evidence. *State v. Scott*, 59 Nebr., 499. In my opinion, the relator has an adequate remedy for everything of which he complains, in due course of law, within the purview of section 646, Code of Civil Procedure. That section provides expressly that the writ of mandamus "may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law," and in so doing merely declares a wholesome and well-settled rule of the common law. If the matters to which relator objects, or any of them, are incompetent, irrelevant, or improper to be considered, this court, on hearing the cause on its merits, will reject them and put them out of the way in considering whether the order complained of is sustained by sufficient evidence. Some of them appear proper to be considered, and have a place in a bill of exceptions. Others at first sight appear very doubtful. But this is not the time nor the occasion to consider the propriety of the court's action in taking such matters into consideration. While we will not review rulings on evidence as such on appeal, the competency or admissibility of the evidence received may be passed upon in reviewing the order appealed from on its merits. *McConnell v. First Nat. Bank*, 38 Nebr., 252, 262, and cases cited. Then is the time to review what the district

judge did. Now we can only require him to make what he did a part of the record. It is for him to say what evidence he received and what matters he took notice of judicially in reaching his conclusion. We ought not to require him to certify to a bill as containing all the evidence considered by him when he considered other matters not set forth therein as well. If he erred in considering them, there is ample opportunity for correcting his error in due course of law.

It is recommended that the former judgment be vacated, and that the writ be denied.

BARNES and OLDHAM, CC., concur in the recommendation.

By the Court: For the reasons stated in the foregoing opinion, the former judgment is vacated and the writ is denied.

WRIT DENIED.

NOTE.—*Judicial Notice*.—We are bound to take judicial notice of historical facts, matters of public notoriety occurring in our midst. 70 Me., 609.—REPORTER.

STATE OF NEBRASKA, EX REL. ALVIN BLESSING, V. HORACE
M. DAVIS.

FILED APRIL 17, 1902. No. 12,534.

Commissioner's opinion, Department No. 3.

1. **Quo Warranto: PRIVATE PERSON: ATTORNEY GENERAL: BURDEN OF PROOF.** In an action of quo warranto, instituted by a private party to obtain possession of a public office, the relator must both plead and prove such facts as show him entitled thereto; but where the action is instituted by the attorney general, the burden is on the respondent to show his title.
2. **Information.** Information in the action examined and held to show that it was instituted by the attorney general.

ORIGINAL application in the nature of a quo warranto to test the right of the respondent to hold the office of

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clerk of the district court for Valley county. Heard on demurrer to petition. *Demurrer overruled.*

° *Frank N. Prout, Attorney General, Norris Brown, Deputy, Clements Bros., E. M. Coffin and A. Norman, for relator.*

W. H. Thompson, Hall & Johnson, T. J. Doyle and H. E. Oleson, contra.

DUFFIE, C.

This is an original action brought by the attorney general to test the right of the respondent to hold the office of clerk of the district court in and for Valley county. The information alleges that at the general election held in said county on the 5th day of November, 1901, Alvin Blessing was duly elected to the office of county clerk of Valley county; that, within the time and in the manner prescribed by law, he took the oath of office, gave a bond, which was duly approved, and became and was, and now is, duly qualified for said office of county clerk of said county, and on the 9th day of January, 1902, and ever since said time, has been acting county clerk of said county; that Valley county on the 7th day of November, 1899, did not contain eight thousand inhabitants; that said county of Valley, ever since its organization, has always been and now is a county of less than eight thousand inhabitants, and that the relator, by virtue of his election and qualification as county clerk of said county, is and has been ever since the 9th day of January, 1902, ex-officio clerk of the district court of said county, and entitled to the care and custody of all the books and records and property of said office, and to exercise the rights and duties of said office and receive the fees and emoluments thereto belonging. It is further alleged that chapter 28 of the Session Laws of the 25th session of the legislature, purporting to authorize the election of a clerk of the district court separate from the county clerk in counties having cast

over sixteen hundred votes at any general election, is void, for certain reasons set out in the information. The information further recites that the respondent has usurped, and still continues to usurp, the office of the clerk of the district court of Valley county, without any legal claim or right, and that he has used and exercised, and still unlawfully uses and exercises, said office of clerk of the district court. To this petition the respondent demurred for the following reasons: (1.) For the reason that the court is without jurisdiction to hear and determine this case, as will be more fully shown by the aforesaid information. (2.) For the reason that the facts therein stated do not constitute a cause of action.

In the argument of the demurrer the attorney for the respondent insisted that the petition showed upon its face that the action was brought by Alvin Blessing, a private party, and that the court had no jurisdiction to hear the cause, for the reason that it was not alleged that he had applied to the attorney general to file the information and that the attorney general had refused or neglected to do so. While the action is entitled "State of Nebraska, ex rel. Alvin Blessing, v. Horace M. Davis," and while the petition in several instances refers to Alvin Blessing as the relator, we think that upon its face the petition shows that it was filed by the attorney general, and that the action is being prosecuted by him in his official capacity. The petition contains the following allegation: "F. N. Prout, attorney general of the state of Nebraska, who prosecutes in his own proper person and at the relation of Alvin Blessing; gives the court to understand and be informed," etc., and then follows a statement of the facts above set out. Section 710 of the Code of Civil Procedure provides that "When the defendant is holding an office to which another is claiming the right, the information should set forth the name of such claimant, and the trial must, if practicable, determine the rights of the contesting parties." It was evidently with this section of the statute in mind that the attorney general used the name of the relator as a party

in the action, and not for the purpose, or with the intent, to make him the real party plaintiff in the action.

The second ground of the demurrer is based upon the assumption that the action is being prosecuted by Alvin Blessing instead of by the attorney general, and it is urged that the petition does not state facts sufficient to constitute a cause of action, in that the number of inhabitants which Valley county actually contains is not stated, nor is the election of Alvin Blessing to the office of county clerk shown by any statement of facts set out in the petition, the allegation that he was duly elected to said office being a mere legal conclusion. The rule, without exception, is that, where a private party institutes an action of this kind to obtain possession of an office held by another, the facts showing his title to the office must be stated in his petition and the burden is upon him to establish his right thereto. Where, however, the attorney general files an information alleging that a party is usurping an office, the respondent, in such cases, must assume the burden of pleading and establishing by his proof all the facts showing his right to the office which he claims. Conceding, for the sake of the argument, that the petition is too general in its statements to state a cause of action, provided it was being prosecuted by Blessing in his own right, still, as we have seen, the action was instituted and is being prosecuted by the attorney general in his official capacity, and the petition need not state any facts going to show that the office properly belongs to Blessing, the burden being upon the respondent to plead and show the facts entitling him to the office.

We recommend that an order be entered overruling the demurrer.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the demurrer is overruled.

DEMURRER OVERRULED.

HENRY WHELEN ET AL., APPELLANTS, v. EDWARD CASSIDY
ET AL., APPELLEES.

FILED APRIL 17, 1902. No. 11,496.

Commissioner's opinion, Department No. 3.

1. **Precinct: TAXES: ASSESSMENT: LEVY: TERRITORIAL INTEGRITY OF PRECINCT.** So far as the assessment of property and the levy of general taxes are concerned, precincts once lawfully established retain their character and territorial integrity until such time as they shall be divided, changed or modified in some manner authorized by law.
2. ———: ———: ———: ———: **WARD OF CITY CONSTITUTING A PRECINCT.** When a village contained within a county, precinct or precincts, becomes organized as a city pursuant to a statute requiring the city authorities to divide its territory into wards, and enacting that each ward, when so created, shall constitute a precinct, the pre-existing precinct or precincts will, for general revenue purposes, remain unaffected until that duty shall be performed.

APPEAL from the district court for Douglas county.
Heard below before DICKINSON, J. *Reversed.*

H. W. Pennock and Virgil O. Strickler, for appellants.

Thomas & Nolan, contra.

AMES, C.

Certain lots and lands situated in the city of South Omaha were sold for general taxes for the year 1892. This is an action for a foreclosure, based upon the certificates of the tax sale. In March, 1887, while the town was organized under, and being governed by, the law relative to villages, the chairman and board of trustees undertook to enact an ordinance dividing the village into three wards. There was no law authorizing such a division, and the ordinance was void. On the 13th day of December, 1887, the village became reorganized as a city of the second class, having more than 5,000 and less than 25,000 inhabitants. The act under which the organization was effected pro-

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vided that the city be divided into not less than four or more than six wards, the boundaries of which should be determined by ordinance. In January, 1888, the mayor and council adopted a measure entitled "An ordinance to amend section of Ordinance No. 11 of the city of South Omaha, Nebraska, relating to wards, so as to read as follows." This measure is called "Ordinance No. 36." "Ordinance No. 11," therein mentioned, is the attempted village ordinance above mentioned. By the last-mentioned document it was undertaken to enact that ward No. 3 should comprise all the territory lying west of the Union Pacific Railroad tracks, the residue of the city being divided into wards numbered 1 and 2. Ordinance No. 36 assumed to divide this territory west of the tracks into two wards, one to be called "Ward No. 3," and the other to be called "Ward No. 4," but made no reference to any other territory of the city or to ordinance No. 11. It therefore did not do what its title represented that it would do,—amend the entire section of ordinance No. 11, relating to wards; nor did it itself divide the city into more than two wards. Presumably the construction put upon the matter by the mayor and council was that their action would divide the territory west of the railroad tracks, and described in the village measure as the "Third Ward," into two wards, and would leave the remaining two wards defined by that measure unaffected. But as already pointed out, the attempted village regulation was void, and hence the territory not lying westward of the railroad tracks had never been divided into wards, and was not so divided by ordinance No. 36, and this latter ordinance was therefore itself ineffectual and void. These are the only attempts to comply with the statute that are disclosed by the record, and the conclusion is inevitable that during the time with which we have to deal the city was not lawfully, nor except, perhaps, by way of estoppel as against the city itself, or persons contracting with it, in any valid manner divided into wards. Before and at the time the city organization was acquired, the territory in which the village was

included was a precinct of Douglas county, known as "South Omaha Precinct"; and the assessment of the whole village for taxation for the year 1892 was made by one H. H. Raven, who described himself, in his oath attached to and returned with the assessment roll, as "Assessor for South Omaha Precinct, Number(blank) Douglas County"; and the sole question before the court is whether, under the circumstances detailed above, his action was wholly unwarranted by law, so as to invalidate the lien of the public for taxes levied that year on the property in suit. The trial court made answer in the affirmative, and dismissed the action, and from its judgment to that effect this appeal is prosecuted.

Counsel have cited no authorities directly in point or closely analogous, and it is not unlikely that there are none, but, in our view, the learned district judge erred. We can not concur in the opinion that the public, as represented by the state and its various political subdivisions, was or could have been defeated of its revenues by the neglect or refusal of the city authorities to obey the mandate of the statute by the division of the city into wards, and the definition of their boundaries. The statute provides that every precinct in the county is a separate district for assessment and revenue purposes, and that the wards of cities, when created, shall each constitute a precinct.

It is, we think, in entire harmony with the statute, as well as indispensable for the orderly conduct of public affairs, to hold that, so far as the assessment of property and the levy of general taxes are concerned, precincts once lawfully established retain their character and territorial integrity until such time as they shall be divided, changed or modified in some manner authorized by law.

For these reasons, it is recommended that the judgment of the district court be reversed, and the case remanded to the district court, with instructions to render a judgment of foreclosure and sale as prayed in the petition.

DUFFIE and ALBERT, CC., concur.

By the Court: For reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the case remanded with instructions to render a judgment of foreclosure and sale as prayed for in the petition.

REVERSED AND REMANDED.

JOHN E. HANSON, APPELLEE, v. HANS E. HANSON, APPELLANT.

FILED APRIL 17, 1902. No. 11,560.

Commissioner's opinion, Department No. 3.

Former Judgment: DEFINITION OF RES JUDICATA. A former judgment is conclusive when the parties and the question involved in the two suits are the same, although the property claimed in them may be different.

APPEAL from the district court for Wayne county. Heard below before CONES, J. *Reversed.*

A. A. Welch, for appellant.

Marston & Marston and Frank Fuller, contra.

ALBERT, C.

This is an action to quiet the title to certain lands in Wayne county. The petition contains the usual allegations. The answer admits that the plaintiff holds the legal title to the lands, but avers, in effect, that at the time such title was acquired the plaintiff and the defendant were copartners, and said title was acquired with the funds of said copartnership, and taken in the name of the plaintiff in trust for its use and benefit, and that no accounting or settlement of the partnership affairs has ever been had between said parties. As a further defense, it is alleged that in an action in ejectment, brought by the plaintiff against the defendant herein, to recover possession of a

part of the lands in controversy in the present action, the defendant pleaded in defense thereto the same facts as those hereinbefore set forth; that issue was joined thereon, and that, on the issue thus joined, the jury found in favor of the defendant, and judgment thereon was duly rendered in his favor; and that such judgment is in full force and effect. The foregoing matters are put in issue by the reply. As to the lands involved in the ejectment suit, the court found in favor of the defendant; as to the other lands, the finding was for the plaintiff. A decree was entered accordingly. The defendant appeals.

The principal question, and the decisive one in this case, is that raised by the plea of *res adjudicata*. The record and the evidence in the ejectment suit are in evidence in this case. From those it conclusively appears that, except for the plea of *res adjudicata*, the defendant pleaded the same defense that is pleaded in this action. It also appears that the title to the whole of the lands involved in the present action, including those involved in the ejectment suit, was acquired at the same time, and, so far as the parties to this suit are concerned, in the same manner, with the same understanding, and as a result of the same venture. From the pleadings, evidence, and instructions of the court, it is clear that the verdict in the ejectment suit involves a finding that the acquisition of the legal title by the plaintiff to the lands involved in the ejectment suit was by means of partnership funds, and as the result of a partnership venture. The plaintiff insists that such facts do not sustain the plea of *res adjudicata*. In support of this position we are cited to many authorities, but none of them are satisfactory. Considerable obscurity may be avoided by keeping in mind the distinction between a judgment, urged as a technical bar to another action, and one that is urged as conclusive as to some one or more points tried and determined in a former action. In *Cromwell v. Sac County*, 94 U. S., 351, the court says: "There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon

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the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. * * * But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." The following cases are to the same effect: *Foye v. Patch*, 132 Mass., 105; *Hanna v. Read*, 40 Am. Rep. [Ill.], 608. From the foregoing, we think it is clear that it is only when the judgment is offered as a bar to a second action that the "four identities" mentioned by some writers, are required. The estoppel is not confined to the judgment, but extends to all steps involved in it as necessary steps or the groundwork upon which it must have been founded. It is allowable to reason back from a judgment to the basis upon which it stands, on the obvious principle that where a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion. *Burlen v. Shannon*, 96 Am. Dec. [Mass.], 733; *Dorris v. Erwin*, 101 Pa. St., 239; *Tuska v. O'Brien*, 68 N. Y., 446. Notwithstanding the language of the pleadings in this case, the defendant's plea of *res adjudicata* is not urged as a bar to the action, but as an estoppel by a former adjudication of one or more of the issues in the present case. As we have seen, the parties and the issues are identical. The judgment in the ejectment suit is based wholly on a verdict which involved a finding of the truth of the allegation relied upon by the defendant as a defense in this action. In other words, it is conclusively established by the judgment in the ejectment case that the title to the lands in controversy was acquired by the plaintiff while he and the defendant were in partnership, with partnership funds and as a partnership venture, and that he holds the legal title thereto in trust for the copartnership. Those ques-

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tions are not open to inquiry in this case, but are forever set at rest between the parties by the judgment in the ejectment suit. *Bazille v. Murray*, 41 N. W. Rep. [Minn.], 238; *Goodnow v. Litchfield*, 9 N. W. Rep. [Ia.] 107; *Wolf River Lumber Co. v. Brown*, 60 N. W. Rep. [Wis.], 996; *Doty v. Brown*, 4 Comstock [N. Y.], 71; Herman, Estoppel & Res Judicata, sec. 247; Freeman, Judgments [3d ed.], sec. 253. With those facts established, together with the conceded fact that no settlement or accounting has been had between the parties, the decree in favor of the plaintiff in this case can not stand.

It is recommended that the decree in favor of the plaintiff in this case be reversed, and the cause remanded for further proceedings according to law.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree in favor of the plaintiff is reversed, and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

E. & H. T. ANTHONY & COMPANY V. CHARLES KARBACH
ET AL.

FILED APRIL 17, 1902. No. 11,587.

Commissioner's opinion, Department No. 3.

1. "Unavoidable Casualty or Misfortune": DISHONESTY OF ATTORNEY. Dishonesty of his attorney, whereby a client is prevented from making a defense to a pending suit, and judgment by default is taken against him, is "unavoidable casualty or misfortune," within the meaning of section 602, Code of Civil Procedure.
2. Vacation of Judgment: PETITION: VERIFICATION: CODE. A petition for the vacation of a judgment, under the provisions of section 603, Code of Civil Procedure, need not be verified positively.
3. Petition Before Court: FILING. Where it appears from the record

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that an answer was actually tendered by the plaintiff with his petition for the vacation of a judgment, and was before the court in such a way as to enable the court to pass upon its sufficiency, the fact that it was not formally filed is immaterial.

4. Order of Vacation: SPECIAL AND GENERAL FINDINGS. In the absence of a request for special findings, a general finding, in a proceeding to vacate a judgment, is sufficient to support an order of vacation.

ERROR from the district court for Douglas county.
Tried below before SLABAUGH, J. *Affirmed.*

B. N. Robertson, for plaintiff in error.

E. J. Cornish, *contra.*

ALBERT, C.

This action was brought by Charles Karbach and Louis Raapke against Anthony & Co., to vacate a judgment in favor of the latter and against the former rendered at the preceding term of the district court. A trial was had, resulting in a finding in favor of the plaintiffs and an order vacating the judgment and granting a new trial. The defendants bring the case here on error.

That portion of the petition which states the grounds upon which a vacation of the judgment is sought is as follows:

"Plaintiffs further allege that immediately upon being served with summons in said action, they went to the office of one ———, an attorney at law, in the city of Omaha, and practicing in all of the courts of said state and retained and engaged said attorney to represent them in said action and stated to said attorney their defenses to said cause of action and further requested said ——— to correspond with all other defendants in said action and notify them of the pendency of said action. Said ——— accepted said employment and promised plaintiffs herein that he would attend to said action and would represent plaintiffs therein and would do all things necessary to be done to protect and care for the rights and interests of the plain-

tiffs in said action, and further would notify all other defendants that said action was pending. Plaintiffs further allege that several times following said agreement with said — and prior to the rendition of judgment in said action they were informed by said — that he had notified the other defendants in said action, as promised by him and had received instructions from said parties to settle said case, that he had made investigation of the facts of said action and had prepared and filed an answer in said action and had done all other things necessary to protect the rights and interests of these plaintiffs in said action. Plaintiffs further allege that on the 3d day of July, 1899, being one of the days of the May, 1899 term of said district court, the above named defendant, E. & H. T. Anthony & Co. procured a judgment of default to be entered against these plaintiffs in said action and further a judgment against these plaintiffs in the sum of two thousand two hundred eleven dollars twenty-five cents (\$2,211.25) and costs of suit, all without the knowledge and consent of these plaintiffs. Plaintiffs further allege that said May, 1899, term of said court came to an end on the 31st day of July, 1899. That they were not informed nor did they know that judgment had been entered in said cause until several days thereafter, to wit: About the 5th day of August; that then they also learned that said — had not notified their co-defendants in said action, nor had he made any appearance whatever in said action, on the part of these plaintiffs, nor had he prepared or filed any answer in said action for these plaintiffs, but had wholly failed and neglected to perform any part of his duties as attorney for these plaintiffs in said action. Plaintiffs further allege that they relied wholly and implicitly upon the agreement made with said — to represent them in said action, and to interpose their defense therein, and relied upon the statement made to them by said — prior to the rendition of judgment in said action; that he had done all things necessary for the protection of the rights of these plaintiffs therein.^a

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The defendants first insist that this case must be reversed because of the insufficiency of the petition. The sufficiency of the petition is challenged on three grounds, which we will consider in their order:

First. Because the facts stated therein are insufficient to entitle the plaintiffs to a vacation of the judgment, in that such facts do not bring the case within any of the grounds specified in section 602 of the Code of Civil Procedure, which provides for the vacation of judgments after the term at which they have been rendered. One of the grounds specified in that section is unavoidable casualty or misfortune, preventing the party from prosecuting or defending. The word "casualty" means accident; that which comes by chance, or without design, or without being a foreseen contingency. The word "misfortune" means ill-luck, ill-fortune, calamity, evil or cross accident. We do not believe it requires any stretch of language to hold that one who has suffered by the dishonesty of his attorney, an officer of the court, as shown by the record in this case, is a victim of casualty and misfortune, as above defined. Where any injury or mishap befalls one, through unforeseen circumstances, which can not ordinarily be guarded against, it is misfortune. *Ex parte Burgess*, 57 L. T. Rep. [n. s.], 200. The supreme court of Iowa, in *Ennis v. Fourth Street Building Ass'n*, 71 N. W. Rep., 426, held, where a party to an action employed an attorney, who filed an answer therein and agreed to appear and defend, and who absconded five days before the case was tried, and the case was tried, submitted, and a decree rendered without the knowledge of such party thereof, or of the absence of his attorney, that such facts constitute unavoidable casualty and misfortune, and entitled such party to have the decree set aside. On principle, the case just cited is not distinguishable from the case at bar.

Second. Because the petition is not verified as required by section 603 of the Code of Civil Procedure. The verification, omitting the caption and jurat, is as follows:

"Charles J. Karbach, being first duly sworn says that he

is one of the plaintiffs in the above entitled action; that he knows the contents of the foregoing petition, and that the allegations therein contained are true as he verily believes."

The objection urged against this verification is that it is not in positive form. The provisions of section 603 do not differ materially from those of section 113, which provides for the verification of the petition in an ordinary action. That the verification would be good, under section 113, will be conceded. We can see no good reason why it should not be held good under section 603. We have not overlooked *Lander v. Abrahamson*, 34 Nebr., 553, where, in the body of the opinion, it is held that the petition, in an action of this kind, must be verified positively. No good reason is given there for the rule announced, nor was the point directly involved in the case. It is entirely omitted from the syllabus. In our opinion, it does not state the correct rule of practice and should not be followed. In our opinion the verification in this case is sufficient.

Third. Because no answer was tendered with the petition. The sufficient answer to this is, that an answer was tendered with the petition. It is true it was not filed in the case as pleadings are usually filed; nor are we sure that it should have been. But it appears from the bill of exceptions that it was tendered with the petition as the answer of the defendants, and was before the court at every stage of the proceedings, whereby the court was enabled to judge of the sufficiency of the defense, upon which the plaintiffs expected to rely in the event that the judgment was vacated and a new trial was granted. That is the only purpose of requiring the plaintiffs to tender an answer with their petition.

It is next urged that the findings of the court are not sustained by sufficient evidence. It would serve no useful purpose to review the testimony at length. It will suffice to say that we have examined it with some care, and are satisfied that it is amply sufficient to sustain the material

allegations of the petition, and shows conclusively that the defendants were the victims of casualty and misfortune, as hereinbefore defined, whereby they were prevented from making a defense to the action.

Complaint is made of the findings of the trial court because they do not show the grounds upon which the order vacating the judgment was made. The findings are general. We know of no rule of practice that requires the court to make specific findings, in the absence of a request therefor. No such request was made in this case. Consequently, the general finding is not only sufficient to sustain the order, but is in conformity with the settled rule of practice. We discover no error in the record, and therefore recommend that the judgment and order of the district court be affirmed.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment and order of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. WILLIAM G. SHRIVER ET AL.,
V. MYRON D. KARR ET AL.

FILED APRIL 23, 1902. No. 12,541.

1. **Equalization: METROPOLITAN CITIES.** Under section 63 of the act incorporating metropolitan cities it is the duty of the city council, sitting as a board of equalization, upon proper complaint duly filed, to hear evidence, consider questions of comparative values and equalize assessments.
2. **Franchises: CORPORATE INDEBTEDNESS: CONSTITUTION.** Section 1, article 9, of the constitution, requires that franchises of corporations shall be assessed for taxation without deducting corporate indebtedness from the value of such franchises.
3. **Revenue Act: CORPORATE INDEBTEDNESS: ACTUAL VALUE OF STOCK: CONSTITUTION.** That part of section 32 of the revenue act which requires the assessor to deduct the amount of the corporate indebtedness from the actual value of the shares of stock to

determine what shall be assessed as capital stock, is unconstitutional and void.

4. **Corporation: CAPITAL STOCK: MARKET VALUE: VALUE OF FRANCHISE: TANGIBLE PROPERTY: RULE.** When capital stock of a corporation has no market value, the "actual value," in the sense in which the words "capital stock" are used in the statute, is found by adding the value of the franchises of the corporation to the value of its tangible property. From this should be deducted the value of the real and personal property which are assessed as such, and the remainder is the value of the capital stock for assessment.
5. **Assessment of Property: FAIR VALUE: BOARD OF EQUALIZATION: COMPLAINT: EQUALIZATION: PROCEDURE.** The statute requires that all property be assessed at its fair value, but this does not prevent the board of equalization from equalizing assessments when property in general in the city has been assessed at a certain percentage of its fair value; and, upon complaint that the property or franchise of a person or corporation is assessed at a less proportion of its value than the percentage of value employed as a basis for assessing the property in general in the city, the board may equalize assessments by raising the assessment complained of to the same proportion of value at which property in general in the city is assessed.

ORIGINAL application for a writ of mandamus to compel the respondents as members of the city council and board of equalization of the city of Omaha to reconvene and consider complaints of the relators alleging inequalities in the assessment of taxes for the year 1902. Opinion of referee follows opinion of court. *Writ awarded.*

James H. McIntosh, for relators.

W. J. Connell, W. W. Morsman, John L. Webster and *George E. Pritchett*, *contra*.

SEDGWICK, J.

The relators obtained an alternative writ of mandamus from this court, directed to the respondents, as members of the city council and board of equalization of the city of Omaha, to compel them to reconvene as a board of equalization and consider and act upon the complaints of the relators alleging inequalities in the assessment of taxes for the year 1902. The respondents made return and answer

to the writ, and a referee was appointed by this court to hear the evidence and report findings of fact and conclusions of law.* Upon the filing of the referee's report the respondents filed exceptions to his findings of fact, and to his conclusion that the costs ought to be taxed against respondents, and the relators filed exceptions to certain of his conclusions of law.

It is alleged in the alternative writ that "said tax commissioner duly completed said assessment roll for said 1902 city taxes, and duly transmitted the same to the city council for equalization; that by said assessment roll so submitted to said city council for equalization the personal property of said Omaha Street Railway Company was assessed at \$550,000, of said Omaha Water Company at \$575,000, of said Omaha Gas Company at \$400,000, of said Nebraska Telephone Company at \$109,310, and of said New Omaha Thomson-Houston Electric Light Company at \$117,500; that no valuation or assessment whatever was placed upon, or made against, the franchises in said city of any one of said corporations, but said several franchises were omitted from said assessment, except as to said electric light company, as aforesaid, although each and all of said franchises are, and then were, of great value, that of said street railway company having a fair cash value of, to wit, \$4,000,000, of said water company of, to wit, \$1,000,000, of said gas company of, to wit, \$1,050,000, of said telephone company of, to wit, \$1,000,000, and of said electric light company of, to wit, \$140,000, that said 1902 assessment was made upon property generally in said city, except the property of said public-service corporations, on a basis of forty per cent. of its fair cash value; that said assessment upon the property of said five corporations was, and is, about ten per cent. of the fair cash value of their property and franchises, as will hereinafter more fully appear"; that the relators duly filed written complaints with the board of equalization to procure an equalization of the assessment of the property and franchises

*For referee's opinion see p. 524.

of said corporations, and that the board adjourned without duly hearing and considering these complaints.

The referee, in his report, after stating at some length the facts found by him from the evidence in regard to the action of the board upon the said complaints, finds "that the action of the board of equalization overruling the complaints filed upon procurement of the Real Estate Exchange did not estop the relators with reference to their five complaints, and was in no sense a matter of adjudication which forbade inquiry into the merits of the complaints of said relators. Upon said five complaints I find, further, that the action of the board in fixing a time for the hearing of the complaints by relators was a sanction of the sufficiency of said complaints in form and substance, and that the conduct of Hascall, Mount, Trostler, Whitehorn and Karr, who alone have answered in this case, was capricious, willful and arbitrary with respect to the complaints filed by the relators and that thereby said relators were deprived of the right to have reviewed the proceedings of the said board of equalization with reference to their above complaints by error proceedings, for the want of a final judgment, and that therefore, irrespective of the final result of this action, because of other considerations hereafter to be set forth, the costs of the case should be taxed against said Isaac S. Hascall, David T. Mount, Simon Trostler, William B. Whitehorn and Myron D. Karr, and judgment rendered accordingly." This finding is excepted to by the respondents as not being supported by the evidence. We do not find it necessary to comment at large upon the evidence. It is sufficient to justify the findings of the referee, and the exceptions to the findings of fact by the referee are therefore overruled.

The referee's conclusions of law, which are excepted to by the relators, are as follows:

"First. The manner in which companies and associations incorporated under the laws of this state (except insurance companies) shall be assessed, is prescribed by section 32, chapter 77, Compiled Statutes, and this method I

find is exclusive of any other method. It is, however, abortive, if not unconstitutional, as to the four corporations, exclusive of the telephone company, which has no debt; for it requires the market or real value of the incorporate stock to be assessed after deducting corporate indebtedness, and this corporate indebtedness is twice deducted,—once in fixing the market or real value of the stock and again by an actual subtraction required by the statute.

“Second. The alternative writ, even as amended, shows that the basis of valuation for assessment purposes in Omaha is forty per cent. of the real value of all property assessed, except the property of the said corporations, and its mandate requires the respondents to ascertain and employ the basis employed generally, and to bring the property of the five public-service corporations above referred to to that standard. By sections 4 and 5, article 1, chapter 77, Compiled Statutes, personal and real property is required to be assessed at its fair value. The peremptory writ must follow the alternative writ, and thereby the respondents would be required to violate the express provisions of sections 4 and 5 aforesaid if the averments in the alternative writ are true.

“Third. It is extremely doubtful whether the city council of the city of Omaha, sitting as a board of equalization, has power to review the proceedings of the board of review. I suggest that this is doubtful, without definitely committing myself on that proposition. I do not hesitate, however, to recommend, and do recommend, that in the exercise of its discretion this court shall refuse to issue a peremptory writ, and that it dismiss this action at the costs of the answering respondents, Isaac S. Hascall, David T. Mount, Simon Trostler, William B. Whitehorn and Myron D. Karr. All of which is respectfully submitted.”

It was the duty of the board of equalization to hear and determine the merits of the complaints in question. The assessment is made by the commissioner and his deputies, and is reviewed and completed by the board of review.

When it is submitted to the city council as a board of equalization it becomes the duty of the board, under the statute, to equalize the assessment. Then the citizens have their first opportunity to complain of inequalities, if any exist, and to have them corrected. Section 63 of the act incorporating metropolitan cities provides: "The council shall have power to act as a board of equalization for the city to equalize all taxes and assessments, and to correct any errors in the listing or valuation of property, and to supply any omissions in the same, but shall sit only after reasonable public notice." Compiled Statutes, ch. 12a. The board can not "equalize all taxes and assessments" without considering comparative values. The purpose of equalization is to "bring the assessments of different parties to the same relative standard so that no one may be compelled to pay a disproportionate part of the tax." Cooley, Taxation, 421. The right of a taxpayer to make complaint before the board and have corrected inequalities in the assessments which result in increasing his burden of taxes is a substantial right and can not be denied him. The board must receive his complaint, hear evidence upon the question of inequalities in the assessments presented thereby, determine the facts, and equalize the assessments. In so doing it is a judicial tribunal, and, as far as possible, must be governed by the ordinary rules of evidence. *State v. Dodge County*, 20 Nebr., 595. It is clear from the facts found by the referee that the relators have been deprived of a right given them by the statute; but the referee concludes that the writ should not be issued, for the reasons given in his conclusions of law above stated. Section 32, art. 1, of the revenue act requires statements of these corporations made to the assessor to set forth particularly: "First—The name and location of the company or association. Second—The amount of capital stock authorized, and the number of shares into which such capital stock is divided. Third—The amount of capital stock paid up. Fourth—The market value, or if no market value then the actual value of

the shares of stock. Fifth—The total amount of all indebtedness, except the indebtedness for current expenses—excluding from such expenses the amount paid for the purchase or improvement of property. Sixth—The assessed valuation of all its real and personal property (which real and personal property shall be listed and valued as other real and personal property is listed and assessed under this chapter),”—and provides that “the aggregate amount of the fifth and sixth items shall be deducted from the aggregate value of its shares of stock, as provided by the fourth item, and the remainder, if any, shall be listed by the assessor in the name of such company or corporation as capital stock thereof.” Compiled Statutes, ch. 77, art. 1.

When the capital stock of a corporation has a market value, that value may be taken as a basis to ascertain the value of its intangible property, since the value of the stock is the net value of its assets, and is found by deducting its indebtedness from the gross value of its tangible and intangible property; but when the capital stock has no market value it can not be used as a basis in ascertaining the value of the assessable property and franchises of the corporation, since the value of the intangible property must be ascertained before the true value of the stock can be determined in the sense in which the term is used in the statute quoted. But our constitution provides, in express terms, that the franchises of corporations must be assessed for taxation; and when, as in this case, it does not appear that the capital stock has any market value, its assessable value, after deducting the tangible property of the corporation, is the same as the value of its franchises. The legislature may direct the manner of ascertaining the value of property and franchises; but it can not prescribe rules that prevent the assessment of the property and franchises of corporations on an equality with property in general in proportion to value.

The constitution (art. 9, sec. 1) provides: “The legislature shall provide such revenue as may be needful, by levy-

ing a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the legislature shall direct." This provision of the constitution does not allow the indebtedness of individuals or corporations to be deducted from the true value of property or franchises in determining the value of such property and franchises for taxation, and if the "manner" of assessment prescribed by the legislature, when strictly pursued, would result in so doing, and would not result in levying a tax "by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises," it violates the constitution, and is so far invalid. *State v. Duluth Gas & Water Co.*, 76 Minn., 96, 78 N.W. Rep., 1032. By the terms of the statute the fourth item is the market value; if no market value, then the actual value of the shares of stock. This actual value of stock which has no market value can be ascertained only by deducting the corporate indebtedness from the gross value of the corporate property and franchises; and, when it is so found, by the terms of the statute, the indebtedness of the corporation is to be again deducted. But this will not do. Our constitution requires the property and franchises to be assessed; and if the corporate indebtedness is deducted it might, and actually would, in case of some of the corporations in question herein, wholly prevent the assessment of their franchises. The individual is not allowed to deduct his indebtedness from the value of his property for assessment purposes. If the indebtedness of a corporation is deducted from the value of its franchises, it would not pay taxes thereon in proportion to the value thereof. This value is to be ascertained in such manner as the legislature shall direct, but it can not require that after the value has been ascertained it shall be offset by indebtedness. This would violate the constitutional provision.

In *State v. Duluth Gas & Water Co.*, *supra*, it was held that the requirement of the statute that the indebtedness

be deducted from the value of the capital stock should be rejected as unconstitutional, and the remaining directions of the statute substantially followed. This seems to be the only way in which the mandate of the constitution can be obeyed and at the same time the valid provisions of the statute be complied with. The assessor, then, should have ascertained the actual value of the capital stock by adding the value of the corporate franchises to the value of the tangible property of the corporations. From the value of the capital stock so found should be deducted the value of real and personal property already assessed, and the remainder would be the value of the capital stock for assessment. The board of equalization, upon hearing the complaints of the relators, should have found whether the value of the capital stock, ascertained as above indicated, had been so assessed that the corporation would be required to pay a tax thereon in proportion to such value, as compared with the values of property in general in the city as assessed for the same tax.

The referee's second conclusion of law is that the peremptory writ must follow the alternative writ, and, as the alternative writ shows that the basis of valuation for assessment purposes in Omaha is forty per cent. of the real value of the property assessed, to issue the peremptory writ as prayed would be to require respondents to violate the express provisions of the statute.

The statute provides: "No other pleading or written allegation is allowed, than the writ and answer. These are the pleadings in the case, and have the same effect and are to be construed and may be amended in the same manner as pleadings in a civil action; and the issues thereby joined must be tried, and the further proceedings thereon had in the same manner as in a civil action." Code of Civil Procedure, sec. 653. And section 647 prescribes the form of the alternative writ, and provides that "the peremptory writ must be in a similar form." No doubt the particular thing commanded by the peremptory writ must be found in "a similar form" in the alternative writ; that is, nothing

can be contained in the peremptory writ that is not embraced in the alternative writ. The liberal rules of amendments provided by the Code apply to this proceeding. If the relators are entitled to the thing commanded in the alternative writ, no doubt verbal inaccuracies in the writ might be amended to conform to the proofs. But the command of the alternative writ to "ascertain from the evidence the standard of valuation adopted and employed by the tax commissioner, his deputies, and the board of review of said city in making said assessment of all taxable property within said city for said 1902 taxes, and that you bring the amount of the several assessments of the personal property and franchises of said several corporations within said city and subject to taxation therein for said 1902 taxes to said standard," is substantially a command to investigate values and equalize the assessment of property so that the corporations complained of shall pay a tax in proportion to the value of their property and franchises. In *State v. Osborn*, 60 Nebr., 415, it was said: "If the property of one citizen is valued for taxation at one-fourth its value, others within the taxing district have the right to demand that their property be assessed on the same basis." From the context and the subject-matter being considered, it is manifest that the doctrine intended by the court was that when the property generally in the city is assessed at a certain proportion of its actual value any person whose property is assessed at a greater proportion of its actual value has ground for complaint, and so, when the property of one person is assessed at a less proportion of its value than the proportion of value at which property in general in the city is assessed, any taxpayer who is injured thereby has cause of complaint. The board of equalization is not so much to consider methods by which the assessor may have reached his conclusion as it is to consider the results of the assessment as returned. If the assessment is unequal, it is the duty of the board, on proper complaint and evidence, to so equalize the assessment that every person and corporation shall pay a tax in proportion

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to the value of his, her or its property and franchises, and no other meaning can be given to the command to ascertain the basis employed generally and bring the amount of the several assessments of the personal property and franchises of the several corporations complained of to that standard, when construed with the allegations and the other commands of the writ.

It is therefore ordered that the peremptory writ issue as prayed. Costs taxed to respondents, Isaac S. Hascall, David T. Mount, Simon Trostler, William B. Whitehorn and Myron D. Karr. Referee allowed \$534.70, to be taxed as a part of the costs in the action.

WRIT AWARDED.

Opinion of Referee.

The proper scope of a report as referee precludes extended discussions, for such a report should present only ultimate conclusions of law and fact. In the trial of this case, there were discussed, very ably and at great length, certain principles which I deem it my duty to present to the court in elucidation of my report, and I adopt this as the least objectionable means of so doing.

The most important question presented, was as to the manner in which corporations should be assessed so as to include the value of their franchises; since, in cases of public service, corporations like street railway companies, the franchise to use the streets is of paramount value, and yet, by reason of intangibility, the value of this franchise is very difficult of ascertainment. It is provided by section 32, article 1, chapter 77, Compiled Statutes, in effect that the value of the capital stock of all companies and associations except insurance companies shall, for the purposes of assessment, be ascertained by deducting from the market value of the entire stock the assessed value of the tangible personal and real property, assessed as is the property of individuals, and, by deducting also from said market value what may be designated as the fixed indebtedness of the company or association to be assessed. The deduction of

the last item, the fixed indebtedness is clearly a mistaken, if not an unconstitutional, provision, as will be very clear upon reflection or upon a consideration of the cases bearing on this proposition. Let us take, for example, a corporation whose capital stock is of the value of \$150,000. If it has no indebtedness, its stock will be taxed at that amount. Under section 128, chapter 16, Compiled Statutes, this corporation might incur an indebtedness of two-thirds the amount of its capital stock, that is to say if, for the purpose of assessment, its indebtedness might be deducted, the assessable value of its capital stock would be but \$50,000. Again, let us suppose three individuals jointly own land of the value of \$150,000. If there is a mortgage against this land of \$100,000 in amount, they, as joint owners, would be compelled to pay taxes without reference to their indebtedness. Suppose, however, the three individuals form a corporation and in its name acquire title to land of the value of \$150,000. One statute would permit this corporation to mortgage the land to the extent of \$100,000, and another statute would exempt from taxation such indebtedness, leaving but \$50,000 in value subject to taxation. This is manifestly absurd, and this absurdity is intensified if we consider what would result from taxing on the basis of forty per cent. of the valuation as, in the alternative writ, the basis for assessment purposes is charged to be. A corporation having stock of the market value of \$150,000, would be assessed at the artificial valuation of forty per cent. thereof, that is, \$60,000. If its indebtedness was \$100,000, as legally it might be, there would be \$40,000 less than nothing to tax. The truth is, that the market value of the stock is properly reached by adding to the value of the stock the indebtedness which is a first lien on the property, and its earnings. In other words, the dealer in shares of stock pays for such shares with reference to the indebtedness of the corporation and thus it is deducted from the value of the stock in ascertaining the market value of the stock. Manifestly, therefore, this indebtedness should be added to restore the face

value of the stock—not subtracted again for the purpose of assessment as required by section 32, chapter 77, Compiled Statutes. I shall now consider adjudged cases upon the proposition I have just been discussing.

In *Adams Express Co. v. Ohio State-Auditor*, 166 U. S., 185, 220, the opinion was delivered by Judge Brewer, in the course of which he said :

Now, it is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale it is also worth for the purposes of taxation. Suppose such a bridge were entirely within the territorial limits of a state, and it appeared that the bridge itself cost only \$1,277,000, could be reproduced for that sum, and yet it was so situated with reference to railroad or other connections, so used by the traveling public, that it was worth to the holders of it in the matter of income \$2,900,000, could be sold in the markets for that sum, was therefore in the eyes of practical business men of the value of \$2,900,000, can there be any doubt of the state's power to assess it at that sum, and to collect taxes from it upon that basis of value? Substance of right demands that whatever be the real value of any property, that value may be accepted by the state for purposes of taxation, and this ought not to be evaded by any mere confusion of words. Suppose an express company is incorporated to transact business within the limits of the state, and does business only within such limits, and for the purpose of transacting that business purchases and holds a few thousand dollars worth of horses and wagons, and yet it so meets the wants of the people dwelling in that state, so uses the tangible property which it possesses, so transacts business therein that its stock becomes in the markets of the state of the actual cash value of hundreds of thousands of dollars. To the owners thereof, for the purposes of income and sale, the corporate property is worth hundreds of thousands of dollars. Does substance of right require that it shall pay taxes only upon the thousands of dollars of tangible property which it possesses? Accumulated wealth will laugh at the crudity of taxing laws which reach only the one and ignore the other, while they who own tangible property not organized into a single producing plant will feel the

injustice of a system which so misplaces the burden of taxation. A distinction must be noticed between the construction of a state law and the power of a state. If a statute, properly construed, contemplates only the taxation of horses and wagons, then those belonging to an express company can be taxed at no higher value than those belonging to a farmer. But if the state comprehends all property in its scheme of taxation, then the good will of an organized and established industry must be recognized as a thing of value. The capital stock of a corporation and the shares in a joint stock company represent not only the tangible property but also the intangible, including therein all corporate franchises and all contracts, privileges and good will of the concern. Now, the same reality of the value of its intangible property exists when a company does not confine its work to the limits of a single state. Take, for instance, the Adams Express Company. According to the return filed by it with the auditor of the state of Ohio, as shown in the records of these cases, its number of shares was 120,000, the market value of each \$140 to \$150. Taking the smaller sum, gives the value of the company's property taken as an entirety as \$16,800,000. In other words, it is worth that for the purposes of income to the holders of the stock and for purposes of sale in the markets of the land. But in the same return it shows that the value of its real estate in Ohio was only \$25,170; of real estate owned outside of Ohio, \$3,005,157.52, or a total of \$3,030,327.52; the value of its personal property in Ohio \$42,065; of personal property outside of Ohio \$1,117,426.05; or a total of \$1,159,491.05, making a total valuation of its tangible property \$1,189,818.57, and upon that basis it insists that taxes shall be levied. But what a mockery of substantial justice it would be for a corporation, whose property is worth to its stockholders for the purposes of income and sale \$16,800,000, to be adjudged liable for taxation upon only one-fourth of that amount. The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income, or for purposes of sale.

In *Porter v. Rockford, R. I. & St. L. R. Co.*, 76 Ill., 561, 588, this language was used:

There is a seeming injustice in taxing corporations which are largely indebted, and whose earnings are insufficient to pay the accruing interest, as is alleged to be the fact in the present case, to the full extent of the value of all their property and privileges, without regard to their indebtedness, yet it has never been the policy of the legislature to make any discrimination in favor of individuals on this account, and corporations can not claim an exemption from taxation when, under like circumstances, an individual would not also be exempt to the same extent. The mode of valuation adopted by the board of equalization assumes: 1st. That the value of the aggregate shares of capital stock is equal to the value of all the property, including the franchise, belonging to the corporation, when it is not indebted. 2d. That when the corporation is indebted, the indebtedness proportionally reduces the value of the shares of capital stock. 3d. That the value of the debt is determined by the value of that belonging to the corporation from which its payment can be enforced, so that however great the nominal amount of the debt, its actual value can never exceed that sum. To illustrate: where a corporation is free from debt, and the aggregate value of its shares of stock is, say, \$150,000, it is assumed that the value of its capital stock, including its franchise, is \$150,000. If the same corporation, still retaining the same property, is, however, indebted \$50,000, this will reduce the aggregate value of its shares of stock to \$100,000; but as the law does not exempt corporations or individuals from the payment of taxes on account of indebtedness, it would not be accurate to tax the corporation at this amount, because to do so would be to exempt it to the extent of its indebtedness. To ascertain, therefore, what would be the aggregate value of its shares of stock, if the corporation were free from debt, it is necessary to add the value of the debt to the value of the shares of stock. If the corporation is, in the given case, indebted \$150,000, the shares of stock will be worth nothing, but the value of the debt will be \$150,000, which is the value of that from which its payment can be enforced, and so, if the corporation is indebted in any greater sum the value of the debt will still be only \$150,000.

The views above expressed were afterwards enforced in *Pacific Hotel Co. v. Lieb*, 83 Ill., 602, and in *State Board of Equalization v. People*, 61 N. E. Rep. [Ill.], 339. The case of *Henderson Bridge Company v. Commonwealth*, 99 Ky., 623, also recognizes as correct the proposition that the addition of fixed indebtedness to the market value of the stock is not a taxation of indebtedness but is just and proper. The case of *State v. Duluth Gas & Water Co.*, 76 Minn., 96, attempted partially to sustain statutory provisions like those contained in section 32, chapter 77, Compiled Statutes, by simply ignoring a deduction of the value of the fixed indebtedness. The concurring opinion of Judge Canty criticises the section of the Minnesota statute corresponding to our section 32 above noted because thereby the indebtedness of the corporation is deducted twice,—first, in ascertaining the value of stock; second, the deduction as required by said section. It seems to have escaped that court's notice, however, that if the latter deduction is omitted, there still remains the first deduction; a most obviously unjust discrimination, for no other taxpayer is allowed a deduction from assessments of real or personal property. In *State Railroad Tax Cases*, 92 U. S., 575, Judge Miller, for the court, said:

It may be assumed for all practical purposes, and it is perhaps absolutely true, that every railroad in Illinois has a bonded indebtedness secured by one or more mortgages. The parties who deal in such bonds are generally keen and far-sighted men, and most careful in their investments. Hence the value which these securities hold in market is one of the truest *criteria*, as far as it goes, of the value of the road as a security for the payment of those bonds. These mortgages are, however, liens on the road, and, taking precedence of the shares of the stockholder, may or may not extinguish the value of his shares. They must in any event affect that value to the exact amount of the aggregate debts. For all that goes to pay that debt and its interest diminishes *pro tanto* the dividend of the shareholder and the value of his share. It is therefore obvious, that, when you have ascertained the current cash value of

the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock.

At this point it may be profitable to note defects which have been actually found to exist in statutes like our own on the subject. In Michigan there was a statutory provision for the assessment of corporations very like section 32, chapter 77, Compiled Statutes,—the requirement as to deduction of indebtedness involving the same principles. In *Detroit Citizens' Street Railway Co. v. Common Council*, 85 N. W. Rep. [Mich.], 96, the fifth paragraph of the syllabus is as follows:

The special provision of Compiled Laws, section 3842, for the assessment of corporations in general, that the value of stock, less the real estate, should be assessed, as well as the cash value of all the personal property, less bona-fide indebtedness, is unconstitutional and void, since it would result in double taxation if there were no real estate and no debts; and besides, the provision as to deducting debts is invalid, because it does not conform to the usual method of deducting debts from credits only.

Section 27, article 1, chapter 77, Compiled Statutes, limits deductions on account of indebtedness in Nebraska to taxable credits, and not only should this fact be considered with reference to the foregoing language but it should be borne in mind in respect to the language of other cases hereinbefore referred to. As section 32, chapter 77, Compiled Statutes, now stands, it is applicable only to corporations formed within this state. The Omaha Water Company is not within this category, consequently there might be some other method adopted for its assessment, but I think a writ should not issue simply with reference to the assessment of this corporation for if forty per cent. is found to be the standard of valuation the claimed equalization could not be made as to this corporation for the rea-

son that the statute (Compiled Statutes, ch. 77, art. 1, secs. 4, 5) requires assessments to be on the basis of full valuation.

Again, the Nebraska Telephone Company is a domestic corporation, and has its principal office or place of business in the city of Omaha. Its stock and franchise should therefore be listed and taxed in that city. Compiled Statutes, ch. 77, sec. 8. It is stated in the brief submitted on behalf of said corporation that its lines extend into Iowa and South Dakota as well as into fifty-seven counties in this state. There is no special provision in our statutes to adequately meet these conditions. If this telephone company is assessed as the statute now requires the listing and taxation of its franchises and capital stock to be done, such listing and assessment must be in Omaha alone, notwithstanding the fact that the principal value of the company's property is probably owing to use of rural and urban public highways in fifty-seven counties in this state as well as the use of highways in the states of Iowa and South Dakota.

It has been held many times by the supreme court of the United States that the property of railroads, telegraph, sleeping car and express companies, engaged in interstate commerce, may be valued as a unit for the purpose of taxation, and that a proportion of the whole, fairly and properly ascertained may be taxed by the state in which it is situated. *Western Union Telegraph Co. v. Taggart*, 163 U. S., 1; *Pittsburg, C., C. & St. L. R. Co. v. Backus*, 154 U. S., 421; *Pullman's Car Co. v. Pennsylvania*, 141 U. S., 18; *Western Union Telegraph Co. v. Attorney General, Massachusetts*, 125 U. S., 530; *Delaware Railroad Tax*, 18 Wall. [U. S.], 206, 208; *Erie R. Co. v. Pennsylvania*, 21 Wall. [U. S.], 492. It would seem that the necessary authority for apportionment by legislative action is recognized in the above cases. In this state there has been no attempt to avail ourselves of that authority.

In argument it was suggested that if a writ should issue the equalization by the board of equalization, as to the

five public service corporations complained of, might be made at the fair cash value of the property and franchises of such corporations. But the relators have expressly pleaded that forty per cent. of the value is the standard adopted and employed as to all property in Omaha, except that of these five corporations, and the relators are estopped to deny the truth of the averments of their own pleading. *Foley v. Holtry*, 41 Nebr., 563; *McKee v. Wild*, 52 Nebr., 9. The constitution of this state empowers the legislature to "provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises" and authorizes municipal corporations to be "vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." Constitution, art. 9, secs. 1 and 6. The relators are seeking to compel action and it is very obvious that they can not compel the enforcement of a valuation as to the property of these corporations two and one-half times the valuation conceded to be placed on other property within the same jurisdiction.

From the foregoing considerations I conclude that before the stocks of corporations, which include their franchises, can be equitably and justly taxed, there must be legislation correcting the inefficiency and crudity of section 32, chapter 77, Compiled Statutes, in the respects indicated, and there should be such additional legislation as will apportion properly the taxation of corporations situated as are the Omaha Water Company and the Nebraska Telephone Company;—the one a company organized in another state; the other doing business in two other states, as well as in fifty-seven different counties in this state.

ROBERT RYAN, *Referee*.

ALVIN L. LEIGH, APPELLEE, v. HENRY S. GREEN, APPELLANT.

FILED APRIL 23, 1902. No. 9,838.

Commissioner's opinion, Department No. 2.

1. **Affidavit: KNOWLEDGE: BELIEF.** It seems that, so long as a witness is willing to and does testify to a fact positively, and not merely to his belief therein, his affidavit, in which it is positively stated, does not become an affidavit upon information and belief by the addition of a further statement that he verily believes all the facts set forth to be true.
2. **Showing: AFFIDAVIT: INFORMATION AND BELIEF.** Where a showing by affidavit is required as to facts which are necessarily matters of information and belief, an affidavit on information and belief is sufficient.
3. **Published Notice: DESCRIPTION.** A description of land in a published notice is sufficient where the context of the notice shows clearly that land in this state is referred to, and there is but one tract in the state answering such description, although it likewise describes another tract situated in another state.
4. **Owner: INCUMBRANCER: LIENHOLDER.** The term "owner" in section 4, article 5, chapter 77, Compiled Statutes, refers to persons having estates in the land in question, and not to incumbrancers and lienholders.
5. **Owner of Land: PHRASE "NOT KNOWN": DILIGENT INQUIRY.** It seems that the owner of land is "not known," within the meaning of said section, when the holder of a tax-certificate is unable, by reasonable diligence and inquiry in the neighborhood of the land in question, to learn the whereabouts of the person or persons appearing to have estates therein or when he is unable to ascertain who have such estates.
6. **Foreclosure: LAND A PARTY: AFFIDAVIT: ALLEGATION.** When the owner of the land is not known to the holder of a tax-certificate and can not be found upon reasonable inquiry, the holder of such certificate may make the land a party to foreclosure proceedings; and in such case allegations in the petition and an affidavit for service by publication on information and belief, to the effect that the owner is unknown, are sufficient as against collateral attack.
7. —: —: —: —: **PARTIES DEFENDANT: PERSONS CLAIMING INTEREST IN LAND: COLLATERAL ATTACK.** Whether or not, in such case, the plaintiff may join as defendants persons claiming some interest in the land, if the land is properly made a

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party, such joinder could at most be an irregularity only, and would not affect the validity of the proceedings when attacked collaterally.

8. **Land a Party: JURISDICTION: NOTICE: FORECLOSURE: DECREE: SALE: NEW AND INDEPENDENT TITLE: BAR.** If the land is properly made a party, and jurisdiction over it is duly acquired by publication of notice, a sale under decree of foreclosure creates a new and independent title, and bars all pre-existing interests or liens.
9. **Proceedings in Rem: DUE PROCESS OF LAW.** Sections 4 and 6, article 5, chapter 77, Compiled Statutes, providing for foreclosure of tax liens by proceedings *in rem* to which the land alone is made a party, and for cutting out all pre-existing rights or liens by sale under decree therein, are not in conflict with the state or federal constitutions, as depriving persons of property without due process of law.

APPEAL from the district court for Knox county. Heard below before ROBINSON, J. Rehearing of case reported in 62 Nebr., 344. *Judgment of reversal adhered to.*

This case was taken to the supreme court of the United States, on writ of error issued by Melville W. Fuller, Chief Justice, July 22, 1902. The federal question involved is a claim on behalf of plaintiff in error (appellee in this court) that sections 4 and 6 of article 5 of chapter 77, Compiled Statutes, is in conflict with the fourteenth amendment to the constitution of the United States.—REPORTER.

W. R. Green, James McCabe, Reed & Gross and Smyth & Smith, for appellant.

C. C. McNish, Anderson & Keefe, Woolworth & McHugh, J. C. Crawford and A. R. Oleson, contra.

POUND, C.

The issues of fact and law involved in this appeal are sufficiently stated in the former opinion. Many of the conclusions reached in that opinion are acquiesced in by the parties, and have not been reargued. Four propositions, however, are insisted upon by counsel for appellee as hav-

ing been overlooked or wrongly determined, and require consideration. These propositions are whether an affidavit for service by publication, made upon information and belief only, is sufficient; whether the description of the land in the published notice was sufficient to give the court jurisdiction in the tax foreclosure proceedings in question; whether, under a proper construction of sections 4 and 6, article 5, chapter 77, Compiled Statutes, foreclosure of a tax lien by suit against the land itself will bar lienholders not made parties to the proceeding and not served with process; and, finally, whether, if such is the proper construction of said sections, they are constitutional and valid, in view of the constitutional provisions, both federal and state, against deprivation of property without due process of law.

With respect to the first question, we may remark that it is by no means clear that the affidavit in question is to be treated as one upon information and belief. Examination of the many cases in which affidavits have been held insufficient because made upon information and belief only, discloses that in such cases the affiant stated that he believed so and so (*Armstrong v. Sanford*, 7 Minn., 34; *Thompson v. Higginbotham*, 18 Kan., 42); or that he had reason to believe and did believe it (*Clarke v. Nebraska Nat. Bank*, 57 Nebr., 314; *Ex parte Spears*, 88 Cal., 640, 26 Pac. Rep., 608; *Ex parte Morgan*, 10 Fed. Rep., 298); or that he was informed and believed so and so (*Ex parte Rowland*, 35 Tex. Cr. Rep., 108, 31 S. W. Rep., 651); or that, on his "best knowledge, information and belief," certain facts were true (*Ex parte Lane*, 6 Fed. Rep., 34); or that certain statements in a pleading were true except as to statements on information and belief and that such statements were believed to be true. *City of Atchison v. Bartholow*, 4 Kan., 124; *Attorney General v. Bank of Chenango*, Hopk. Ch. [N. Y.], 671. In another class of cases, more nearly like the one at bar, the affiant states that certain facts are true, as he believes, or as he is informed and believes. *State v. County Commissioners*, 49 Nebr., 51;

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State v. Mayor, 4 Nebr., 260; *Clarke v. Nebraska Nat. Bank*, 57 Nebr., 314; *Mowry v. Sanborn*, 65 N. Y., 581. The case at bar differs from all of these. The statements in the affidavit are made positively, but at the end, after stating directly that the owner of the land in question is unknown, there is the further statement "all of which I verily believe to be true." It will be seen that whereas, in the cases cited, the affiant did not make any positive statements of fact, but merely stated that he believed, or was informed and believed that certain facts existed, in this case the statements are made positively and directly, and there is merely an additional statement that affiant believes them to be true. Does this further statement qualify or detract from what goes before? In *Webster v. Daniel*, 47 Ark., 131, 139, 14 S. W. Rep., 550, the affidavit stated "that said Peter Webster has left the county of his residence to avoid the service of a summons as shown by the return of a constable to the writ of summons issued herein." The court held that this was not an affidavit as to what the return showed, nor to belief based on information derived from the return, but was positive, and referred to the return as evidence only. In *Re Keller*, 36 Fed. Rep., 681, 685, a complaint in extradition proceedings stated an offense positively and directly. A statement was added to the effect that the complainant verily believed the facts stated to be true. The court said: "If it is conceded that this court can construe this pleading and reject it, still I think it is not faulty. It is a statement of a fact which the deponent, in testifying to, verily believes to be true. A man swears to what he believes to be true; and when he states a fact under oath, he says he verily believes it to be true. I do not think it is faulty on that account. I think this affidavit is sufficient." In *Pratt v. Stevens*, 94 N. Y., 387, the court said: "The addition of the words 'to deponent's best knowledge, information and belief,' does not modify or detract from the words previously employed. The general rule is that an oath taken before a competent officer merely verifies truth of the facts stated,

according to the best knowledge, information and belief of the affiant. The positive affirmation of the fact sworn to in an affidavit is in most cases supposed and understood to be according to the best knowledge, information and belief of the witness." The true criterion would seem to lie in the willingness of the witness to make a positive statement. If his information and knowledge are such that he will make a positive statement of the fact in question upon oath, his evidence is to be received, though the weight to be given it might be small by reason of the nature and extent of the information and knowledge from which he testifies. On the other hand, if he has a belief or opinion, but is not so completely satisfied of the fact that he will testify to it directly, but merely states his belief, then the bare statement of what he believes, but will not state positively upon his oath, is not to be received, unless the case is one where an affidavit as to his belief only is required. In the case at bar, there is a direct and positive statement that the owner is unknown. The further statement that affiant believes it to be true does not detract therefrom. He not only believes it, he is willing to testify to it positively. This is much more than a mere statement of his belief. But construing the affidavit with counsel for appellee, and giving to the words with which it closes all the effect claimed for them, we agree to the conclusion reached at the former hearing, and think it sufficient. Where a showing by affidavit is required as to facts which are necessarily matters of information and belief, an affidavit on information and belief ought to suffice. The statute should receive a construction in accordance with common sense. It was not intended to require perjury, and, as it requires affidavit to matters involving legal opinion and conclusions of law and fact, it must contemplate that such affidavit will be made upon the only basis on which such opinions and conclusions can be reached. As ALBERT, C., said in the former opinion, with reference to the required showing that service can not be made in the state: "In the very nature of things, upon this point at least, the affiant,

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whatever the wording of the affidavit, can never have positive knowledge. * * * To expressly state that which, in the absence of such statement, would be necessarily implied, affects only the form and not the substance of the affidavit." This is no less true of the statement that the owner of the land in controversy is not known. In a trial where numerous witnesses are successively examined the several facts and circumstances may be made to appear by competent proof, and the trier of fact may draw the proper inference therefrom. But where one man is to make affidavit to the conclusion, he must in fact state the belief which the information in his possession gives rise to, whether he expressly says so or not; otherwise the required affidavit could never be made. In *Colton v. Rupert*, 60 Mich., 318, 326, 27 N. W. Rep., 520, the court say: "In such case an affidavit upon information and belief is all that could reasonably be required. To require that such proof should be established by such evidence as would preclude all reasonable doubt, or of such character and weight as would preclude a possibility of error, would deprive this provision of the statute, in a large majority of cases, of any efficacy, and result in a failure of the remedy designed to be afforded by the law. The law itself is based upon the necessity of the case, in order to enable parties to reach and deal with property within the jurisdiction of the court." A similar observation is made in *Snell v. Mcservy*, 91 Ia., 322, 59 N. W. Rep., 32, and the great weight of authority sustains this view. See, also, *Trew v. Guskil*, 10 Ind., 265; *Bonsell v. Bonsell*, 41 Ind., 476.

We do not think the cases of *Clarke v. Nebraska Nat. Bank*, 57 Nebr., 314, and *Mowry v. Sanborn*, 65 N. Y., 581, conflict in any way with the foregoing proposition. In *Clarke v. Nebraska Nat. Bank* the statute required proof of certain facts to the satisfaction of the judge. These facts were capable of positive proof, directly or by circumstances. There was no requirement that the proof be by affidavit solely. The statute expressly stated

that it might be made by affidavit of the judgment creditor "or otherwise." It was the clear duty of the moving party in that case to furnish proof. If he could not do so by his own positive affidavit, he might do so by some other means. To furnish an affidavit to conclusions which proof might establish, stating them not as facts, but as matters of belief and opinion, was not enough. The distinction between such a case and the one at bar is manifest. Nor is *Mowry v. Sanborn, supra*, in point. There the affidavit was not as to non-residence generally, but as to the exact place where persons, whose residence was known, in fact resided. Such known fact was capable of positive proof.

It is next contended that the land was not made a party to the foreclosure suit, and that the court did not get jurisdiction over it, because it was insufficiently described. In the title to the petition and in the published notice it is described as the "northwest quarter of section 27, township 31, range 3, west sixth principal meridian," without stating in what county or state, nor whether the township in question is north or south of the base line. So far as the petition is concerned, however, the objection is clearly untenable for the reason that in the body of the pleading it is expressly stated that the land lies in Knox county, Nebraska. We think the notice sufficient also. The notice sets forth that plaintiff claims to have purchased said land for taxes at a tax sale held in Knox county, Nebraska. Thus the context shows that land in this state is referred to, not merely by the venue of the proceedings, but by the nature of plaintiff's claim. Although the description is equally applicable to another tract situated in the state of Kansas, there is but one tract in this state to which it can possibly refer. In *Fanning v. Krapfl*, 68 Ia., 244, 26 N. W. Rep., 133, a published notice was directed to "P. T. B. Hopkins, wife of John C. Hopkins." Said defendant's true name was "T. P. B. Hopkins." The court said: "The notice should describe the party to whom it is directed with such certainty as that neither he, nor other persons acquainted

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with or knowing him could reasonably be misled by it as to the person for whom it was intended. * * * If the notice had come to her attention, she would have learned from it that it was intended for the wife of John C. Hopkins, which was the name of her own husband, and that it related to an interest of which W. R. I. Hopkins, who held the property now in question in trust for her, was trustee. She could hardly have failed to learn from it that she was the identical person for whom it was intended, and she could not reasonably have been misled by the transposition of the initial letters of the Christian name which occurred in it." So in this case. No one who read the notice could reasonably suppose that it referred, or might refer, to lands in Kansas. There was a tract answering the description in Knox county, Nebraska, and the notice set forth that a lien was asserted against the tract by virtue of a tax sale held in said Knox county. No one could well be misled by the omission of the word "north" under such circumstances. The same kind of description has been passed on several times where contained in deeds, and has been upheld always when there was but one tract answering the description in the state, if the context or circumstances indicated the state sufficiently. *Long v. Wagoner*, 47 Mo., 178; *Bcal v. Blair*, 33 Ia., 318; *Butler v. Davis*, 5 Nebr., 521. It may be admitted that the question to be determined in these cases was somewhat different. But the reasons assigned seem to us to be applicable. If the whole notice makes it clear what lands are referred to, we think it is enough. This holding does not conflict with the case of *Cohen v. Trowbridge*, 6 Kan., 385. In that case a notice failing to state whether the range in which the tract attached lay was east or west of the meridian was held invalid. But there are two ranges numbered 18 in Kansas, and hence two tracts in that state were within the terms of the notice. The true rule is announced in *Fanning v. Krapfl*, *supra*. A great many titles depend upon foreclosure proceedings based on service by publication. If no reasonable

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person can be misled by a description, we ought not to imperil titles by criticising it over minutely.

Coming now to the construction of sections 4 and 6, article 5, chapter 77, Compiled Statutes, we are satisfied that the former opinion is in every way a correct exposition thereof, and that it should be adhered to. That the term "owner," as used in said section 4, refers to persons having estates in the land and not to incumbrancers and lien-holders, is made very plain. In what cases it may be said that the owner is "not known" within the meaning of said section, is a question of some difficulty. Is it meant that the condition of the title must be such that with ordinary diligence one who investigates can not pronounce in whom it lies? Or is it meant that the person in whom the title appears to be can not be identified, located, or found? If the latter, to whom must he be unknown—the plaintiff or the community generally in which the land lies? Or must he be absolutely unknown? As we have in this case a collateral attack on the decree of foreclosure, it may not be necessary to go deeply into the questions to which this apparently simple phrase gives rise. We think that the owner of land is "not known" within the meaning of said section, whenever the holder of a tax certificate is unable by reasonable diligence and inquiry in the neighborhood of the land in question to ascertain the whereabouts of the person or persons appearing to have legal estates therein, or to ascertain who have such estates. In the latter case he can not know whom to make parties; in the former, he can not know how to serve them, since he does not know, nor can he ascertain, whether they are residents or non-residents of the state, and, if residents, where they are to be reached. Hence, when the owner of the land is not known to the holder of a tax certificate in either sense, and can not be found upon reasonable inquiry, the holder of such certificate may make the land a party to foreclosure proceedings. In such case, for reasons already set forth, allegations in the petition and an affidavit for service by publication on information and belief, to the effect that

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the owner is unknown are sufficient against collateral attack. Van Fleet, Collateral Attack, secs. 245, 247.

The plaintiff in the tax-foreclosure suit joined one Root as a party defendant, alleging that he claimed some interest in the land; and we have next to consider the effect of this joinder. It has been seen that all persons having interests in the land in controversy are not for that reason "owners," within the meaning of the statute; hence Root might have had an interest by way of lien or incumbrance, and yet the allegation that the owner was unknown might have been entirely true. So long as the land was properly made a party, it was unnecessary to join parties who merely claimed interests short of ownership. They would be cut out by decree and sale without being joined, under express provisions of the statute. We do not think that the nature of the proceeding was changed in any way by joining Root. The land was properly made a party and all necessary steps to get it before the court were duly had. Whether the joinder of Root was irregular we need not decide. The important point here is that the land was sued. If the plaintiff sued another defendant also, the propriety of such course is not to be reviewed collaterally. (It may be remarked, however, that parties claiming interests in the land are often joined in cases like the one under consideration in other jurisdictions, and no question appears to have been made but that the proceedings are nevertheless *in rem*, and bind others claiming interests in the property, who have not been joined. *Pritchard v. Madren*, 24 Kan., 486; *Hunger v. Barlow*, 39 Ia., 539; *Nash v. Church*, 10 Wis., *303.

Upon the question as to the effect of making the land a party and of sale under decree against the land, we are entirely satisfied with the construction put upon the statute in the former opinion. The provisions of the statute are express that, "in case the land itself is made defendant in the suit, the deed shall be an absolute bar against all persons, unless the court proceedings are void for want of jurisdiction; the object and intent of this section being to

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create a new and independent title, by virtue of the sale, entirely unconnected with all prior titles." Compiled Statutes, ch. 77, art. 5, sec. 6. There is every reason for construing this section to mean what it says. As remarked by ALBERT, C., in the former opinion, the procedure for enforcing tax liens is a part of the revenue system of the state. We can not assent to the argument of counsel that, after the taxes have been sold to a private purchaser, the state loses all concern with the matter, and it becomes purely a case of enforcing an ordinary lien, to be governed by the ordinary principles of private law. The state must provide some means for speedy collection, if it expects to sell its taxes. If the necessities of public affairs compel the state to sell taxes in order to get in revenues quickly, they also require that every proper inducement be held out to tax-purchasers in order that taxes be readily saleable. The provision for foreclosure by the purchaser is much less drastic than the common method of conveying the land outright to the tax-purchaser by an administrative act, without any judicial inquiry whatever. Moreover, there is nothing novel or peculiar about the proceeding. It is known to the laws of many states, and has been given the full force and effect intended by the statutes. *Pritchard v. Madren*, 24 Kan., 486; *Chauncey v. Wass*, 35 Minn., 1, 30 N. W. Rep., 826; *Ball v. Ridge Copper Co.*, 118 Mich., 7, 76 N. W. Rep., 130; *Freeman*, Judgments, sec. 607. We agree to the conclusion reached at the former hearing that, if the land was properly made a party and jurisdiction over it was duly acquired by publication of notice, a sale under decree of foreclosure created a new and independent title, and barred all pre-existing interests or liens.

The statute expressly awards to the purchaser at tax sale a remedy by suit against the land itself, available whenever the owner is not known, whereby all persons claiming interests in the land may be barred completely on sale under decree of foreclosure. In so far as they give this remedy to the purchaser, are sections 4 and 6, article 5, chapter 77, Compiled Statutes, in conflict with provisions

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of the state and federal constitutions against depriving persons of property without due process of law? We think not. The power of the state to levy taxes obviously carries with it the power to collect them, and to provide all means necessary or appropriate to insure and enforce their collection. "What method shall be devised for the collection of a tax, the legislature must determine, subject only to such rules, limitations, and restraints as the constitution of the state may have imposed. Very summary methods are sanctioned by practice and precedent." Cooley, Constitutional Limitations, *521, 6th ed., 645. Sale and issuance of a tax deed creating a new title and cutting off liens and incumbrances (*Bagley v. Castile*, 42 Ark., 77; *Chambers v. People*, 113 Ill., 509); levy and sale by the tax-collector (*Springer v. United States*, 102 U. S., 586; *Sawyer v. Dooley*, 21 Nev., 390, 32 Pac. Rep., 437); issuance of a warrant by the treasurer, and levy thereunder (*Weimer v. Bunbury*, 30 Mich., 201); making taxes a paramount lien, cutting out prior claims and incumbrances (*Lydecker v. Palisade Land Co.*, 33 N. J. Eq., 415); imprisoning a delinquent collector on a writ of extent issued summarily (*In re Hackett*, 53 Vt., 354); issuance of execution by the tax-collector (*State v. Allen*, 2 McCord [S. Car.], *55); seizure and forfeiture of the property taxed (*Henderson's Distilled Spirits*, 14 Wall. [U. S.], 44),—are some of the summary modes of collection which have been upheld. Also, in *Murray v. Hoboken Land & Improvement Co.*, 18 How. [U. S.], 272, a statute authorizing a warrant to issue against a public debtor for seizure of his property, upon an ascertainment of the amount due by administrative officers, was held constitutional. As was said in *Re Hackett*, *supra*: "Taxes are the life-blood of government. Unless duly assessed, collected, and paid over to the proper disbursing officer, its functions are paralyzed, and disintegration and anarchy are imminent." In consequence, so long as the tax is valid, all manner of summary proceedings to collect it have always been sanctioned, the statute providing for assessment and levy being held

to afford due and sufficient notice. Counsel admit this, but contend that summary methods can be employed only by the state itself, acting directly. They say: "The summary method by which a party may be divested of his interest in the lands without judicial procedure can be justified only when he is withholding moneys belonging to the state; beyond that the principle can not go." Again: "The foreclosure of the lien of a tax certificate by judicial proceeding by a private party to realize the amount due under his lien is a judicial proceeding simply, in which the rights and powers of the sovereignty are not involved." We can not agree. The state must have its revenues. There is no summary administrative proceeding for collection of taxes upon land available under our statutes. Foreclosure is the sole method of enforcement. But the state can not wait the slow process of foreclosure and sale. Selling the tax and authorizing the purchaser to collect it is a method of collection almost as old as taxation itself. Under our statute the state sells to a purchaser and gives to him the same remedy it would have had had it chosen or been able to wait. It is obvious that purchasers might not buy unless given some sure and speedy remedy. The interests of the state and its necessities demand that great inducements be held out to tax purchasers. Otherwise the state would not get in its revenues. Hence we see no reason why a remedy which the state may employ directly to collect its revenues may not be awarded to an assignee to whom the state has been obliged to sell its claim in order to realize promptly thereon. The right of the state to exercise other powers through individuals is undoubted. In the *Slaughter-House Cases*, 16 Wall. [U. S.], 36, 64, Miller, J., said: "If this statute had imposed on the city of New Orleans precisely the same duties, accompanied by the same privileges, which it has on the corporation which it created, it is believed that no question would have been raised as to its constitutionality. In that case the effect on the butchers in pursuit of their occupation and on the public would be the same as it is now. Why can not the

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legislature confer the same powers on another corporation, created for a lawful and useful public object, that it can on the municipal corporation already existing?" The exercise of the right of eminent domain by corporations is an every-day occurrence, and section 39, article 2, chapter 93a, Compiled Statutes, allows it to private individuals in furtherance of works of irrigation. If the state could authorize the county to proceed by suit against the land in case the delinquent owner was unknown, it could equally authorize a private purchaser of the taxes to maintain such proceeding, and for the same reasons.

We should not forget, however, that the proceeding in question is not summary in the sense in which that term may be applied to the usual run of methods of collecting taxes. It is not as if the purchaser were authorized to advertise and sell the land, or to have the sheriff do so on request. He must wait the expiration of a long period of redemption. He must then bring a suit, make all proper parties if the owners are known, publish due notice upon showing by affidavit if they are not, make proper proofs of the levy and sale and the amount due to a court in a proceeding in which every person interested may intervene, and then, after decree of foreclosure, await the due course of judicial sale and confirmation. The opportunities afforded to all persons affected to make known their claims are ample. They have no right to lie by and suffer the taxes to get many years in arrear, without exercising any diligence to protect their claims.

We recommend that the former judgment be adhered to.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former judgment is adhered to.

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX REL. GEORGE PETERS, v. JOHN D. MCBRIDE.

FILED APRIL 23, 1902. No. 12,604.

Commissioner's opinion, Department No. 3.

Bastardy: COMPROMISE. The complainant has no authority to compromise a judgment rendered in bastardy proceedings.

ERROR from the district court for Cass county. Tried below before JESSEN, J. *Affirmed.*

Matthew Gering, for plaintiff in error.

A. J. Graves and *C. S. Polk*, *contra.*

ALBERT, C.

In 1897 George Peters was the defendant in bastardy proceedings pending in the district court of Cass county, wherein he was charged with being the father of the illegitimate child of one Minnie Killian. On a plea of guilty, it was adjudged that he stand charged with the support of the child in the sum of \$1,300, to be paid in instalments covering a period of twelve years. The bond was fixed at \$2,500. From such judgment he prosecuted error to this court, where the judgment was affirmed, November 20, 1901. *Peters v. Killian*, 63 Nebr., 57. A mandate issued, and judgment was rendered thereon in the district court on the 7th day of January, 1902. A capias issued, directing the sheriff to arrest the said Peters and confine him in jail until he should comply with the judgment for the maintenance of the child. Under this writ, Peters was arrested by John D. McBride, sheriff of said county, on the 25th day of February, 1902. On the 3d day of March, thereafter, he entered into a bond in favor of the commissioners of Cass county in the sum of \$2,000, conditioned to hold said county harmless, which was approved by the clerk of the district court, and paid the costs of the proceedings. On the following day he demanded his release,

which was refused; whereupon he made application to the district court for a writ of habeas corpus. In addition to the giving of the bond and the payment of the costs, it is alleged in the application that during the pendency of the proceedings in error, hereinbefore mentioned, the said Minnie Killian, in consideration of \$275, to her paid by him, the relator, and his agreement to pay her attorney fees in the sum of \$100, had released and discharged the said judgment of record. The sheriff made return, the issues were made up and a trial had to the court. The writ was denied, and the relator brings error.

The question that meets us at the threshold is whether the complainant in bastardy proceedings has authority to release a judgment rendered therein. In *Peters v. Killian*, 63 Nebr., 57, it was held that a settlement between the parents of an illegitimate child, in order to be operative as a stay or termination of bastardy proceedings, must be of such nature, and made and attested in such manner, as the act prescribed. Our statute regulating proceedings of this character is borrowed from the state of Ohio. The supreme court of that state, in *Perkins v. Mobley*, 4 Ohio St., 669, in which the statute in question was before the court for construction, says: "At one point in the proceeding a settlement may be made. If, when the accused is brought before the justice, he pays or secures to be paid to the complainant, such sum of money or property as she may agree to receive in full satisfaction, and shall further give bond, that the child shall not become a township charge upon any township in this state, the justice is authorized to discharge him from custody on his paying the costs. But to prevent all imposition, the agreement must be made or acknowledged by both parties, in the presence of the justice, who is required to make a memorandum thereof upon his docket. No power whatever is given to the complainant to impair the public security in this settlement. It can not be made until the accused has given security that the public shall not be burdened with the support of the child. If such security is not given, he

must be bound over; and when recognized, no further power is given to settle or compromise the controversy. If found guilty, he shall be adjudged the reputed father of the child, and shall stand charged with the maintenance thereof, in such sum or sums as the court shall order and direct, with payment of costs of prosecution; for which he must give security, or go into custody. It will be observed that no authority is given to take indemnity by bond to secure the public against the support of the child, after the prosecution leaves the justice. The only indemnity afforded after that time is the sums awarded to be paid, and the stringent modes provided for their enforcement. To allow the complainant to intervene and prevent the recovery, would be to surrender all protection for the public and to defeat the leading object of the whole statute. We are therefore of opinion, that she has no such interest in the money, required to be awarded against the reputed father, as to enable her to release his liability before a recovery, or to discharge him from the sum awarded, after the order is made; that the statute definitely appropriates the money to the support of the child, and that it can not be diverted from that purpose. It is ordinarily, and very properly, ordered to be paid over to the mother, as she continues burdened with the custody and support of the child; but even this is within the sound discretion of the court, which should be exercised with a view to the best interests of the child, and the consequent protection of the public from being made chargeable with its support." That decision was rendered before the adoption of the statute by this state. It is a settled rule, that in the adoption of the statute of a sister state the state adopting it adopts the construction which the former has placed upon it.* Even though we should ignore this rule, the reasoning employed in the case just cited meets our entire approval. The release relied on in this case, if it be a release, was executed by the complaining witness. On the authority of

*See note at head of Digest of Cases Overruled, page —. —REPORTER.

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the case just cited, she had no authority to execute it. It is a mere nullity, and the court properly ignored it. The bond given, and approved by the clerk of the district court, was not a bond for the payment of the judgment, but to hold the county harmless. There is no provision of the statute for such a bond after the case has proceeded to judgment. Being unauthorized, the clerk's approval of such bond was an idle ceremony. The relator has not complied with the judgment of the district court. His attempts to avoid it have been abortive. It follows that he is not entitled to a discharge.

It is therefore recommended that the judgment of the district court be affirmed.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MARY H. GIBSON, APPELLEE, v. ELMER E. SWEET, IM-
PLEADED WITH LIZZIE SIDWELL ET AL., APPELLANTS.

FILED MAY 8, 1902. No. 11,820.

Appraisers: WITNESSES: VALUE OF REAL ESTATE. An honest difference of opinion between appraisers and witnesses, as to the value of real estate sold under a decree of foreclosure, affords no sufficient ground for setting the sale aside.

APPEAL from the district court for Custer county.
Heard below before SULLIVAN, J. *Affirmed.*

Nathan T. Gadd, for appellants.

Alpha Morgan, contra.

PER CURIAM.

This is an appeal from an order of the district court confirming a sale of real estate made by the sheriff of

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Custer county under a decree of foreclosure. The property was appraised at \$2,000. Several witnesses for appellants fixed its value at \$3,000. There is nothing to indicate that the appraisers acted fraudulently, and it is not even certain that they committed an error of judgment. In these circumstances, it is clear that the order of confirmation should be, and it is,

AFFIRMED.

WILLIAM W. HARE, APPELLANT, v. JACOB H. WINTERER ET
AL., APPELLEES.

FILED MAY 8, 1902. No. 10,325.

1. **Finding of Fact.** The finding of a trial court upon an issue of fact, is conclusive in this court, unless clearly wrong.
2. **Bonus: USURY.** If the lender's agent exacts from the borrower, for the use of money, a bonus or commission, in addition to the highest lawful rate of interest, the transaction is a violation of the law against usury.
3. **Agent: SERVICES: KNOWLEDGE OF LENDER.** Where a person through whose agency a loan was negotiated rendered valuable services to the lender, and there was no reason to suppose that such services were gratuitous, the court or jury will ordinarily be justified in presuming that the lender knew the borrower had been required to pay for such services.
4. **Judgment of Persons Having Adverse Interests.** It would seem to be a warrantable presumption of fact, based on common experience, that men who rely habitually in business transactions on the advice and judgment of persons representing adverse interests, seldom or never have money to loan.
5. **Evidence.** Evidence examined and found to justify the conclusion of the trial court that an agent who had negotiated a loan acted for the lender and not for the borrower.

APPEAL from the district court for Deuel county.
Heard below before GRIMES, J. *Affirmed.*

Hoagland & Hoagland, for appellant.

Wilcox & Halligan and *James Harvey Hooper*, contra.

SULLIVAN, C. J.

This action to foreclose a real estate mortgage was brought by Hare against Winterer and, upon a trial of the issue raised by a plea of usury, was decided in favor of the defendant. By this appeal it is sought to reverse the judgment on the ground that it is not sufficiently supported by the evidence. The trial court made the following findings of fact:

"1st. That on November 15, 1890, the defendants made, executed and delivered the note and mortgage sued upon, whereby they promised to pay to the plaintiff on November 15, 1895, the sum of \$300.00 with interest thereon from date until paid, at the rate of ten per cent. per annum and that said mortgage covers the southwest $\frac{1}{4}$ of section 8, in township 16 north of range 42 west and said mortgage was duly recorded on the 17th day of November, 1890, in the mortgage records of Deuel county.

"2d. That at the time of making said loan, the plaintiff was a farmer and lawyer, residing at Groton, Tompkins county, New York; that the application for said loan was made by the defendant to one Van Marter, who was at that time a resident of Deuel county, and who has since died; that defendants application for said loan was by said Van Marter transmitted to the plaintiff; whether said application was written or oral does not appear; that in consummating said loan, the defendants had no correspondence or conversation with the plaintiff or other person other than said Van Marter, but did all of the business with and through said Van Marter.

"3d. That said Van Marter in making the contract for the loan sued upon, required that defendants should pay therefor, in addition to the payment of interest thereon at the rate of ten per cent. per annum, upon the full face of the loan, a commission or bonus of three per cent. of the full amount of the face of said loan amounting to the sum of \$9.00, as further compensation for said loan, as well as additional sum of \$5.00 for abstract and ex-

penses in making the loan and the payment of said commission or bonus and said sum of \$5.00 for abstract and expenses was agreed to by the defendants and said Van Marter at the time defendants made their said application to said Van Marter for said loan, the same to be paid by the defendants out of the proceeds of said loan when received.

"4th. That plaintiff made the loan sued upon on the application made by the defendants to said Van Marter; said Van Marter caused the note and mortgage sued upon to be drawn.

"5th. That in transmitting the money to be loaned to defendants, the plaintiff procured a draft for the sum of \$300.00 payable to J. Winterer, one of the defendants herein, and sent the same to said Van Marter, with directions to turn the same over to defendants, when defendants executed a note and mortgage to plaintiff on their lands for the amount of the draft and produced an abstract showing the title all right; this direction was by letter written by plaintiff to said Van Marter, and accompanied said draft.

"6th. That on receipt of said draft and letter of direction by the said Van Marter, the defendants executed and delivered to said Van Marter, the note and mortgage sued upon, and received from said Van Marter the said draft for \$300.00, which draft defendants caused to be cashed and within a day or two thereafter, paid said Van Marter out of the proceeds thereof, the sum of \$14.00, pursuant to the agreement made between defendants and said Van Marter at the time defendants made their said application for said loan.

"7th. That in making defendants the loan sued upon, the plaintiff trusted and relied upon said Van Marter to draw the note and mortgage, examine the abstract, pass upon the title and do all things necessary to close the loan.

"8th. That altogether, the plaintiff made about 25 loans in number in the neighborhood or community where the defendants live, and that said Van Marter recommended

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all loans asked for, and that said Van Marter recommended the loan herein involved."

With respect to these findings counsel for the plaintiff say: "The findings of fact by the court are a fair statement of such facts as shown by the evidence, except that the court failed to state that plaintiff did not place any money in the hands of Van Marter to loan for him; did not do any act which placed power in the hands of Van Marter to exact usurious interest and had no knowledge whatever that any loans or usurious interest were exacted." Whether there is any merit in counsel's criticism depends mainly upon the conclusions to be drawn from the facts found. It depends also to some extent upon certain testimony of the parties which is in substance here set out: The defendant testified that he did not employ Van Marter, but made application to him for a loan because he was known in the neighborhood as a money loaner; that Van Marter told defendant he was loaning money for Hare and could let him have \$300; that when interest upon the loan became due Van Marter repeatedly demanded payment. The plaintiff testified that he had for some time been making loans in Deuel and Keith counties upon securities approved by Van Marter; that in making those loans he had no agent or representative in Nebraska and did not know who passed on the abstracts of title or who recorded his mortgages; that the interest upon most of these loans was collected by Van Marter and by him remitted in the usual way to Groton, New York. Plaintiff also testified that Van Marter, in making the loans, was acting for the borrowers.

The doctrine has been repeatedly asserted in this state that where an agent of the lender exacts for the use of money a bonus or commission from the borrower in addition to the highest lawful rate of interest, the transaction is usurious. *Hare v. Hooper*, 56 Nebr., 480, and cases there cited. In such case it is said the whole transaction is but one contract and that the principal, although ignorant of the wrongful act of his agent, is

affected by it. *Philo v. Butterfield*, 3 Nebr., 256; *Olmsted v. New England Mortgage Security Co.*, 11 Nebr., 487; *New England Mortgage Security Co. v. Hendrickson*, 13 Nebr., 157. In the *Olmsted Case*, MAXWELL, C. J., after remarking that the borrower can not ground a defense of usury upon the acts of his own agent, goes on to say: "But on the other hand, if a person places money under the control of another to loan for him, and the agent charges the borrower unlawful interest, or receives a bonus from him for such loan, either with or without the knowledge of the principal, he is affected by the act of his agent. The reason is, the principal has entrusted the business of making loans to him and has placed the money in his hands for that purpose, and in transacting the business by agency, there can not be a distinct agreement between the lender through his agent with the borrower. and a different one between the agent and borrower, as it is in consideration of the loan that the unlawful interest or bonus is paid. The whole transaction is but one contract, which being made by his agent, the lender is bound by it."

In this case it is not necessary to go to the length of holding that the principal is affected by the misconduct of his agent whether he had knowledge of it or not. From the evidence in the record it is, in our judgment, a warrantable conclusion that Van Marter was the plaintiff's agent and that the plaintiff knew the loan was made in violation of the statute against usury. The draft for \$300 was in Van Marter's hands before the mortgage was drawn. Whether the loan should be made depended entirely upon him. If he approved the form of the mortgage, the manner of its execution and the defendant's title, the loan would be made; otherwise it would be rejected. The theory that Van Marter represented the defendant and acted only for him in the transaction may be plausible, but we can not believe it is sound. Men who trust so much to persons representing adverse interests are not ordinary products of modern civilization; they are anachronisms;

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they belong either to the golden age or the millennium; and in any case it is moderately safe to assume that they are not members of the legal profession, who indulge a passion for farming and still have money to loan. Certainly the trial court had very good reasons for holding that the plaintiff, a man of wide experience, a farmer, capitalist and lawyer, had, in the transaction in question, relied upon his own agent, a person who, by reason of the agency, would be bound in law and morals to render him faithful and disinterested service, rather than upon the agent of the defendant, a person whose duty and allegiance would belong to the defendant alone. If this were an action by Hare against Van Marter to recover damages for negligence, it would hardly be contended that the evidence would not justify a finding of agency. If the property, when the loan was made, was burdened with an inchoate lien for a large amount in favor of mechanics or materialmen, it would hardly be claimed that Van Marter, having knowledge of this fact, was not guilty of a breach of duty to Hare. Suppose the defendant held the legal title in trust for a person in possession of the land, and this was known to Van Marter at the time he received the mortgage and delivered the draft. In such circumstances would any one doubt that Hare had been injured by the misconduct of his own agent? The services rendered by Van Marter were distinctly beneficial to the plaintiff; part of such services concerned no one else. The plaintiff knew what was being done for his advantage and protection and he had no reason to suppose that Van Marter was working for nothing. He evidently understood that the agent was to receive his compensation from the defendant for recommending the land as adequate security, for acting as custodian of the \$300 draft, for passing judgment on the mortgage and abstract, for recording the mortgage, and for collecting interest on the loan. The charge for these services, plus interest at ten per cent., was the consideration which defendant was to pay for the use of the borrowed money. The plaintiff, it is true, was

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to receive directly nothing but interest on the loan, but by requiring defendant to pay the agent's charges he received indirectly the amount of those charges. The rule forbidding a lender to receive or contract for more than ten per cent. is clearly violated when the borrower is required to pay, in addition to such interest, the amount charged by the lender's agent for services rendered to the lender in negotiating the loan. Under circumstances quite like those we are here considering the supreme court of Georgia in *Merck v. American Freehold Land Mortgage Co.*, 7 S. E. Rep., 265, held that the person through whose agency the money was loaned was an intermediary, and sustained a judgment of the trial court in favor of the lender. The opinion was written by a very eminent jurist, but we are not satisfied that his reasoning is sound; and if we were so satisfied, we could not follow the decision without rejecting the authority of our own cases. One who represents another in a business transaction is his agent; and the relationship of the parties to each other, and the consequences flowing from such relationship, are, it seems to us, in nowise changed or affected by calling the agent an intermediary. A person who does an act by another in contemplation of law does it himself, however you may describe the legal connection between the parties.

The judgment heretofore rendered by this court is set aside, and the judgment of the district court is

AFFIRMED.

JOSEPH C. MOORE V. STATE OF NEBRASKA.

FILED MAY 8, 1902. No. 12,495.

1. **Intoxicating Liquors: SALE ON SUNDAY OR DAY OF ELECTION.** To justify a conviction under section 14, chapter 50, Compiled Statutes, 1901, it must appear that the defendant, either by himself, or his agent or employee, sold or gave away intoxicating liquors on the day of a general or special election, or on the first day of the week, commonly called Sunday.

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2. **Sale by Servant.** Such a sale by a servant without the express or implied authority of his master, is not a sale by the master within the meaning of said section.
3. **Question for Jury.** Whether instructions by a master to his servant not to sell or give away intoxicating drinks on Sunday or an election day were colorable only, or were given in good faith, in the expectation that they would be obeyed, and with the intention that they should operate as a limitation upon the servant's authority, is a question for the jury.

ERROR from the district court for Custer county. Tried below before SULLIVAN, J. *Affirmed.*

Nathan T. Gadd and Charles H. Holcomb, for plaintiff in error.

Frank N. Prout, Attorney General, and Norris Brown, Deputy, for the state:

A saloon-keeper is liable criminally for all violations of chapter 50 of the Compiled Statutes committed by his servant in his place of business, although he is himself absent and ignorant of such violations. We think the law is well settled that the relation of master and servant exists between a saloon-keeper and his bartender. We have no doubt that the law holds the master to the same accountability in both civil and criminal cases, that it does the servant. *Black, Intoxicating Liquors*, secs. 369, 371; *Robinson v. State*, 38 Ark., 641; *Martin v. State*, 30 Nebr., 507.

SULLIVAN, C. J.

Section 14 of the act regulating the license and sale of malt, spirituous and vinous liquors is as follows: "Every person who shall sell or give away any malt, spirituous, and vinous liquors on the day of any general or special election, or at any time during the first day of the week, commonly called Sunday, shall forfeit and pay for every such offense, the sum of one hundred dollars." *Compiled Statutes*, ch. 50. Under this section Moore was

tried, found guilty and sentenced to pay a fine of \$100. The ground relied upon for a reversal of the sentence is that the evidence did not warrant a conviction. It was conclusively proved that the defendant was a licensed vender of intoxicating drinks, doing business in the village of Anselmo, and that the illegal sales charged in the information were made in his saloon by his bartender. The evidence given on behalf of the defendant shows the sales were made without his knowledge, in violation of express instructions and during his absence from the village. Do these facts acquit the defendant of criminal responsibility? This is the decisive question in the case, and it is the only question counsel have discussed. The statute does not assume to make masters liable for the conduct of their servants, but only for their own conduct. Of course, what one does by another he does himself; and it is conceded that an allegation that the defendant sold liquors on Sunday would be sustained by proof that he caused them to be sold. But it would not be sustained by proof that sales were made without his consent and in violation of his instructions. Such sales would not be made by his authority, and consequently would not be his sales. Under statutes similar to the one above set out, a master is affected by the acts of his servant only to the extent that they have been actually authorized. In other words, an agency will not be presumed where none in fact existed. Among the cases sustaining this view are: *State v. Mahoney*, 23 Minn., 181; *State v. Mueller*, 38 Minn., 497; *Lathrope v. State*, 51 Ind., 192; *Commonwealth v. Nichols*, 51 Mass., 259; *Commonwealth v. Briant*, 142 Mass., 463; *Commonwealth v. Hayes*, 145 Mass., 289; *Anderson v. State*, 22 Ohio St., 305; *Barnes v. State*, 19 Conn., 398; *State v. Heckler*, 81 Mo., 417; *State v. Meagher*, 49 Mo. App., 571. The doctrine of these cases is not opposed to the decision in *Martin v. State*, 30 Nebr., 507, where it was held that the master was liable for the acts of his servant, there being no evidence of any limitation upon the servant's authority. If the

sales here in question were made by the bartender without authority and against the will and contrary to the instructions of the defendant, they were not the defendant's acts and he is not answerable for them in a criminal action. But whether the instructions to the bartender not to sell on Sunday were given in good faith, with the expectation that they would be obeyed, and with the intention that they should operate as a limitation upon his authority, was a question of fact which there was sufficient reason for resolving in favor of the state. The servant who made the illegal sales was not discharged nor, it seems, even reprov'd or admonished. He had been accustomed to go to the saloon on Sunday and it seems to have been the general understanding that when he was there the place was open for business; for on the day in question some eight or ten persons came expecting to be served, and none of them went away disappointed. It is not unreasonable to infer that the expectations of these people were based on past experiences. The defendant himself was in the habit of going to the saloon on Sunday with his friends. When asked whether he was in the habit of keeping his place open for business on Sunday, he said: "Well, I don't think I was," and further along, in answer to a similar question, he said: "Well, I never considered I done any business on Sunday in Anselmo." In other answers he positively denied that he made any sales on Sunday, but his entire testimony was of such a character as to justify the conclusion that he was an occasional, if not an habitual, violator of the law against selling intoxicants on Sunday, and that the instructions given to the bartender were colorable, merely. There was probably no real intention to withhold from the bartender authority to sell on the Sabbath, and in the absence of such intention, the instructions were of no consequence. *Commonwealth v. Hayes, supra; Anderson v. State, supra; State v. Wentworth*, 65 Me., 234; *State v. Reiley*, 75 Mo. 521.

The judgment is

AFFIRMED.

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NOTE.—*Sale to a Minor by a Partner, Agent or Servant.—Authorship and Construction of Statute.*—A partner in a saloon or dram-shop is criminally liable for an illegal sale of liquor to a minor, by his copartner, or agent, though he was absent at the time and knew nothing about it. Eakin, J., dissenting. *Waller v. State*, 38 Ark., 656. See Judge Eakin's dissenting opinion in *Robinson & Warren v. State*, 38 Ark., 641, 648. The private instructions of the proprietors to the clerks and bartenders in relation to selling to minors, are incompetent and irrelevant. *Loeb v. State*, 75 Ga., 258. Most of the authorities cited in the foregoing opinion hold that a sale by a servant is prima-facie evidence of the master's assent. The statute cited in the opinion, was drawn by John H. Ames. It was first interpreted by the supreme court in *State v. Simmott*, 15 Nebr., 471, to describe an offense which could be prosecuted by indictment. The court below held that the procedure was by an action in debt.—REPORTER.

JAMES P. MILLIGAN V. JAMES H. GALLEN ET AL.

FILED MAY 8, 1902. No. 12,566.

1. **Sheriff: FORECLOSURE: SALE: PROCEEDS: VIRTUTE OFFICII.** Money received by a sheriff, as the proceeds of a sale made by him under a decree foreclosing a real estate mortgage, is money received by virtue of his office.
2. —: —: —: —: —: RECOVERY ON OFFICIAL BOND. A judgment for the conversion of money so received, may be recovered in an action on the sheriff's official bond.
3. **Foreclosure: JUNIOR MORTGAGEE NOT A PARTY: SURPLUS: RIGHT TO CLAIM.** A junior mortgagee who has not been made a party to a suit to foreclose a first mortgage, is entitled to claim and receive any money resulting from the foreclosure sale and remaining in the sheriff's hands, after the first mortgage has been satisfied.
4. —: —: REDEMPTION: SUBROGATION. But if such junior mortgagee is permitted to redeem the land, and does in fact redeem it, the purchaser is subrogated to his rights under the mortgage, and may claim the fund upon which such mortgage is a lien.

ERROR to the district court for Cuming county. Tried below before GRAVES, J. *Reversed.*

Andrew R. Oleson, for plaintiff in error.

Milton McLaughlin, contra.

SULLIVAN, C. J.

This was an action upon a sheriff's bond. The court sustained a general demurrer to the petition and gave judgment on the merits in favor of the defendants. The facts pleaded, and which were held insufficient to constitute a cause of action are, in substance, these: Timblain gave two mortgages upon real estate in Cuming county, the first being to Dufrene and the second to Gibson. Gibson sold his mortgage, but the purchaser did not record the assignment. Under a decree of foreclosure rendered in an action upon the first mortgage, James P. Milligan, the plaintiff herein, bought a small tract of the mortgaged land, and paid the sheriff therefor the sum of \$400. This sale was confirmed by the court and a deed made pursuant to the order of confirmation. Gibson, being the apparent owner of the second mortgage, was made a party defendant in the foreclosure suit, but his assignee, the real owner of the mortgage, having failed to record his assignment, or otherwise disclose his interest in the property, was not brought in. Of the amount paid by plaintiff as the purchase price of the tract struck off to him. \$16.88, that being sufficient to satisfy the decree, was turned over to Dufrene. The remainder was retained by the sheriff and has since been applied by him to his personal use. Afterwards the owner of the Gibson mortgage brought an action in the federal circuit court and there obtained a decree permitting him to redeem the land. Having been deprived of his property under this decree, the plaintiff contends that he is entitled to a judgment against the sheriff and his sureties for the money converted by the sheriff to his own use. It seems to us that he is clearly entitled to this relief. It was the duty of the sheriff to pay over to the person or officer entitled thereto all moneys which came into his hands by virtue of his office. The bond in suit was given to secure the performance of that duty. The money paid by plaintiff came into the sheriff's hands by virtue of his office. He

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was therefore bound to pay it over to the person lawfully entitled to receive it. The owner of the second mortgage was entitled to receive it up to the time he exercised the right of redemption given him by the federal court. After that time it belonged absolutely to the plaintiff. The principle of subrogation made it his. By asserting the right of redemption the owner of the second mortgage renounced his right to the purchase money in the sheriff's hands and the plaintiff at once succeeded to the latter right. By giving up the land to satisfy the mortgage the plaintiff became in equity and good conscience the owner of the mortgage; he became, by the doctrine of subrogation, the equitable assignee of the security which he had discharged. *Arlington State Bank v. Paulsen*, 57 Nebr., 717; *Emmert v. Thompson*, 52 N. W. Rep. [Minn.], 31. In reaching this conclusion, the writer does not wish to be understood as conceding the correctness of the decree of the United States circuit court, nor as agreeing to the doctrine of *Peterborough Savings Bank v. Pierce*, 54 Nebr., 712, upon which it is said the federal decision is in part founded.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THOMAS J. SMITH ET AL. V. FINLEY SMITH.

FILED MAY 8, 1902. No. 11,441.

1. **Conditions Subsequent.** Ordinarily, where a devise of real property is couched in such language as to show an intention to vest title in the devisee immediately upon the will becoming operative, and attached to the devise are certain conditions, the compliance with and performance of which may accompany or follow the vesting of the title in the devisee, such conditions will be construed as conditions subsequent.
2. —. Conditions set out in the opinion in the present case. *held* to be conditions subsequent.

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3. ———: REASONABLE: BAPTISMAL NAME. Conditions in a will that the devisee should be christened and baptized by a certain name, and none other name, and that he shall maintain and be known by that name during his natural life, are reasonable, such as a testator may lawfully impose, and enforceable.
4. **Construction of Will.** The provisions and conditions of a will, like those of other contracts, are to be construed by the courts with the view of carrying out the intentions of the testator.
5. **Will: COMPLIANCE WITH CONDITIONS.** The deceased, Thomas Smith, by his last will devised his real estate to a son near two years old, by the name of Finley Smith, by his second wife. The son had, before the execution of the will, been given the name Bertrand Smith. Attached to the devise were the conditions that the said son should be baptized and christened Finley Smith, and none other name but Finley Smith, and that he should maintain and be known by that name during his natural life, and, if such conditions were not performed and complied with, the real estate devised should revert to the testator's other children (naming them), and their legal heirs. The evidence discloses that, while formal compliance had been had of the condition of the will as to the devisee being baptized and christened by the name Finley Smith, that he had never maintained or been known by that name prior to the time he arrived at twenty-one years of age, when a contest arose as to his rights to the property under the said provisions of the will. *Held*, That by reason of such non-compliance, and the failure to perform the condition imposed by the terms of the will, the title of the devise to the property devised thereby ceased and terminated, and that such property reverted to the other children of the testator, and their heirs, according to the alternative provisions of the will.

ERROR from the district court for Otoe county.
Tried below before RAMSEY, J. *Reversed*.

Stephen B. Pound and Roscoe Pound, for plaintiffs in error.

W. F. Moran and W. C. Sloan, *contra*.

HOLCOMB, J.

One Thomas Smith, deceased, by his last will devised his real estate, some 240 acres, situated in Otoe county, and being all the land he owned, to his infant son, by the name of Finley Smith. The devisee named was the issue

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of a second marriage by the testator. To the devise were attached certain conditions, upon the failure to comply with or perform which, the title of the devisee, Finley Smith, in and to the lands devised, was to cease and terminate, and the property devolve on the children of the testator by his first wife, and their heirs. The will further provided that the executors therein nominated were to have charge of the said real estate until the son, Finley Smith, should arrive at his majority, when the same, with the accrued rents and profits, was to be turned over to him; he then and thereafter to have full control and unrestricted possession of all of said property. When Finley Smith arrived at the age of twenty-one, the executors made their final report to the probate court; and prior to any order directing the delivery of the possession of the property in the hands and under the control of the executors to the devisee, Finley Smith, the other heirs mentioned in the will filed formal protest and objection to any order of distribution of the estate in favor of the said Finley Smith, on the ground and for the reason that the conditions mentioned in the will, which by its terms were to be performed and complied with by the devisee first named, had not been complied with nor fulfilled, and because thereof his title to the property had been forfeited, and the objectors thereupon became invested with the title to the property, under the alternative provision of the will. From a finding and order in the probate court adverse to the devisee, Finley Smith, he appealed to the district court. After issues were formed and a trial had in the latter tribunal, the order of the probate court was vacated and set aside, and a decree entered in favor of the devisee, Finley Smith. Those to whom the land was devised over on a failure to comply with the conditions imposed on the devisee, Finley Smith, prosecute error proceedings in this court for the purpose of obtaining a review and reversal of the findings and decree of the district court.

The provisions referred to in the will of the testator,

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Thomas Smith, deceased, which give rise to the present controversy, and have resulted in the litigation we are asked to review, are as follows:

"I hereby devise and bequeath to my son, Finley Smith, by my second wife, Sarah, all of my lands and real estate lying and situate in Hendricks precinct, Otoe county, Nebraska. This devise and bequest is made on the following terms and conditions. That my son Finley shall have for his support the entire net proceeds from said lands and real estate until he reaches the age of twelve years. My executors to have full charge and control of all of said real estate and lands. To rent the same, pay all taxes and necessary repairs to prevent waste and pay the balance to the guardian of my son Finley for his said support. After he shall have reached the age of twelve years then the net income from the said farm as aforesaid shall be placed at interest both principal and accruing interest, until my son Finley shall have reached the age of twenty-one years, when the whole amount shall be paid him by my executors. My son Finley shall have no further use of said moneys out of said lands except as aforesaid, nor the occupancy of said lands until he has reached the full age of twenty-one years then he is to come into the full possession of the same and to have and hold all the right, title and interest I am now possessed of in said lands and real estate.

"The conditions of the above devise and bequest to my son Finley are these: That my son Finley shall be baptized and christened Finley Smith and none other name but Finley Smith, and that he shall maintain and be known by that name, during his natural life. If otherwise that is to say, if he is not christened Finley Smith and does not maintain that name, then this devise and bequest to my son Finley Smith shall be of no effect whatever and void, and my real estate and lands shall be divided equally among my three sons, William, John R., and Thomas, or their legal heirs. And I make a further condition to my bequest and devise to my son Finley. That should my

son Finley die before he marries and has issue then in that case, the said lands shall revert to my three sons William, John R. and Thomas, and be divided equally among them as before mentioned."

While some collateral questions are presented in briefs of counsel of respective parties, in our view of the record now before us the main and important question to be determined is whether, as a matter of fact, there has been such a compliance with the terms and conditions of the will with respect of the devise to Finley Smith as to entitle him to the property of the deceased testator, or whether the property should be held to revert to the other devisees mentioned, under the terms of the will, because of non-compliance with such conditions. It seems reasonably clear, as we read the entire instrument, that the conditions heretofore set forth to be performed and complied with on behalf of, and on the part of the said Finley Smith were to follow and be complied with after the vesting of the estate in the person mentioned, and are therefore conditions subsequent; that is, by the terms of the will the property was devised to the son Finley Smith on the death of the testator; the title to remain in him, and the property to be held and possessed by him, only on condition that he should be baptized and christened Finley Smith, and none other name but Finley Smith, and that he should maintain and be known by that name throughout his natural life, and that in the event of either of the conditions named, or both of them, not being complied with, the property should revert to the testator's other sons therein named, and their legal heirs. Such construction, we think, carries out the intention expressed by the testator, and gives force and effect to all the different provisions of the instrument. The title to the property did not vest in the executors, the other devisees mentioned, except on breach of the conditions named in the will, nor in the heirs at law. Consequently we think the title must be held to have vested on the death of the testator conditionally in the son Finley Smith, to be divested on failure to comply with the

conditions by which it was provided he should hold his title. This construction we regard as the only reasonable one to be given, and in harmony with the authorities generally on the subject. Tiedeman, Real Property, sec. 273; *Finlay v. King's Lessee*, 3 Pet. [U. S.], 345; *Taylor v. Mason*, 9 Wheat. [U. S.], 325; *Petro v. Cassiday*, 13 Ind., 289; *Bell County v. Alexander*, 22 Tex., 350; 2 Jarman, Wills (Notes by Randolph & Talcott), p. 509, and note 3. The property was the testator's in his lifetime. It was his to make such disposition of as accorded with his own views and judgment, and in its devolution he could impose such conditions as to him seemed proper, which were not in themselves unreasonable in character, or contravened by some recognized rule of public policy or positive law. That the conditions imposed are reasonable, and such as he was authorized to prescribe, is not questioned, and can not, we think, be challenged on any tenable grounds. 1 Underhill, Wills, sec. 516; 2 Jarman, Wills (Randolph & Talcott ed.), p. 579; *Taylor v. Mason*, *supra*; *Webster v. Cooper*, 14 How. [U. S.], 488, 500; *Merrill v. Wisconsin Female College*, 74 Wis., 415, 43 N. W. Rep., 104. In such a case it is the duty of the court to construe such provisions in a will, like all other contracts, with a view of carrying out the intention of the testator. *St. James Orphan Asylum v. Shelby*, 60 Nebr., 796, 811.

With these preliminary observations we proceed to a discussion of the record relative to the question of whether the conditions subsequent to which we have alluded have been performed and complied with, so as to preserve to the defendant in error title to the property devolving on him by the terms of the instrument under consideration. The district court found there had been a substantial compliance with such conditions, and, in reviewing the case, we are required to determine whether such finding is reconcilable with any reasonable view which may be taken of the evidence submitted in the cause. As introductory to what follows, we should perhaps here state that it is disclosed by the record that the mother of the son Finley

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Smith and the deceased had been married but a short time prior to his death; the son at the time of his father's death being under two years of age. The son, it seems, had been named after his birth, and before the execution of the will, Bertrand Smith. It appears that the deceased and his second wife failed to live together peaceably and harmoniously; that she had applied for a divorce, was living apart from him during his last sickness, and was not at his bedside at his death. A short time prior to his death, and apparently in contemplation of his early demise, the husband and wife, in a discussion of their domestic affairs, agreed that the child's name should be changed from Bertrand to Finley, and that he should become a beneficiary of the father's estate by will thereafter to be executed. The reason therefor will appear later on. No provisions were made in the will for the wife, nor was she mentioned as a beneficiary; and, save her dower interest, she was given nothing of the estate of the deceased. After the incident just mentioned, the will in controversy was executed, with the conditions included therein which we have noted. The testimony of the mother is that the child, about ten months after the decease of the testator, was christened Finley Smith, and that he maintained that name until he was twenty-one years old, when the present litigation had its origin. The son testified to substantially the same state of facts as the mother, except that his recollection did not extend back to the acts of christening, or regarding matters transpiring before he became six or seven years of age.

Regarding the statement that the son had maintained the name Finley Smith since the alleged christening, we can regard it only in the nature of a conclusion, rather than a statement of fact, and unquestionably contradicted by every transaction and fact shown in evidence during the entire period covered by the testimony. It is manifest that the father desired his son to be named and known as Finley Smith, and none other name, in order to conform to a family custom existing for many years of its past

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history, and also to perpetuate that particular name, in honor of a brother bearing the same name. The name appears to have been one maintained in the family for generations. It was these considerations, and to accomplish the object mentioned, which caused the testator to devise to the child of his second wife all his real estate, to the exclusion of his other children. As we view the record, it is obvious that the one purpose and object which actuated the testator respecting the matter, and induced him to make disposition of the property as he did to the son first mentioned, and to make his title thereto depend on the conditions so forcibly and clearly expressed in his will, was solely to perpetuate the name Finley in the family, as had been the custom for generations past and gone. Have those conditions been fairly met and complied with? The actual facts, as disclosed by the record,—and they are not controverted save by the very general answers of the mother and son to which we have made mention,—are substantially as follows: The will was executed October 27, 1879, and the testator died November 14th, following. The child called Finley Smith in the will was at the time of the death of his father under two years of age, and prior to that time had been given the christian name Bertrand. It appears that after the death of the testator, and the probate of his will, the mother, in September, 1880, had the child baptized by the name of Finley Smith; the ceremony being performed privately by a minister of the Seward Mission of the Methodist Protestant Church at Utica, in Seward county, in the room of a private dwelling-house where the mother was then staying; there being no witness to the ceremony, save the lady with whom the mother was staying. The certificate introduced in evidence simply recites "that Finley Smith was baptized by the undersigned, an ordained minister of the M. P. Church, pastor of the Seward Mission Nebraska Conference, given this first day of September, 1880. C. E. Phinney, Pastor. Witness, Mrs. S. E. Babcock." It is insisted that this act of christening and baptism was not in good faith, with a view

of carrying into effect the intention of the testator, and there appears much merit in the contention. The mother soon returned to Bennett, Nebraska, where she had formerly resided, and the child continued to be known as Bert or Bertie Smith,—a contraction of the name first given,—and was so called by the members of his own family, consisting of the mother and two older half-brothers. When he was old enough to go to school, his name was given to the census enumerators and enrolled in the school registers as Bertie Smith, and he was so known among his schoolmates and playmates generally. The evidence is conclusive that his name was never in fact changed, and it was not known among those with whom he associated that his name was other than Bert, Bertie or Bertrand Smith. It is true the mother testifies that she did not call him by these names, but she called him “babe” or “son”; and it is equally true that she knew all the time that the name by which he was known generally, and that which was used in the family in her presence and hearing, and apparently with her consent and approval, if not actual procurement, was contrary to the wishes and intention of the testator, and in violation of the expressed provisions of the will. When he was seven or eight years old the family removed to Lincoln, where, so far as the evidence discloses, the name of Bertrand, or one of its contractions, was still maintained as his Christian name, and by which he was known to those with whom he associated. After residing in Lincoln some two years, the family removed to California, where it remained until about the time the son arrived at the age of twenty-one, when they returned to Bennett, Otoe county, where they resided, except for a short time when in the state of Iowa, until the commencement of the present litigation. During all this period of time the son maintained the name of Bertrand, first given him, with the possible exception of rare occurrences, when his name would be signed with the initial letter F., as standing for a middle given name. At no time and no place does it appear from the evidence that he main-

tained the name Finley Smith, used that name as his rightful one, or was ever addressed by such name by those with whom he associated or did business. When he returned to the neighborhood where he had lived as a child, he was there again called and known by his early name of Bert and Bertie, and gave full recognition to that name as being his right one,—made no objection, correction or protest when so addressed. He managed and conducted his business affairs, received mail, signed papers, and in other ways held himself out to all the world by and under the name of Bertrand, Bert, and Bert F. Smith. All this the son himself practically admits in his testimony while on the witness stand. Notwithstanding his compliance with the provisions of the will was vigorously challenged by the other children, and a trial had regarding the matter, he could not, nor could his mother, who must in some degree be held responsible for the condition of affairs, and who testified in his behalf, produce the slightest documentary evidence, save the certificate of baptism mentioned,—no signature, no correspondence, no written memoranda, and no writing of any kind during the twenty-one years of his life, voluntarily entered into or made by either him or his mother, who was his natural and legal guardian,—as proof that he had in good faith been given, taken, adopted and maintained as his true name, Finley Smith, in conformity with the expressed desire and intention of his deceased father, the testator. If further proof is lacking of a manifest failure to comply with the conditions of the will, it is found in the fact that after the litigation had begun, and when he was called upon to show that he had maintained the name Finley Smith, according to the provisions of the will and intentions of the testator, he was unable to correctly spell the name Finley until he had been instructed after incorrectly spelling the name in signing the paper first filed in the case in his behalf.

It is urged in excuse for the action of the devisee that he can not be held accountable for any act or omission to act until he arrived at the age of his majority. But this,

clearly, was not the intention of the testator, as expressed in his will, and it was for him to prescribe and define the terms and conditions upon which his property should descend on the devisee first named; and the conditions he imposed, it would seem, should be complied with, whether accomplished by the son's acts, on his own volition and judgment, or by another acting for and on his behalf. *Johnson v. Warren*, 74 Mich., 491; *Merrill v. Wisconsin Female College*, 74 Wis., 415; *Stover's Appeal*, 77 Pa. St., 282. Clearly, from the wording of the instrument, it was the intention of the testator that the devisee should be baptized and christened Finley Smith within a reasonable time after his death and the probate of his will, and that he should maintain that name, and none other, as therein expressed during his natural life; that is, from the time of the christening and baptism, for the remainder of his life, he should maintain the name Finley Smith, given him by the contemplated christening. It was not the intention of the testator that he should be christened by the name Finley, and then, at some future and indefinite period, assume, be known, and maintain that name, but that the act of christening was to be followed continuously by all acts necessary and required to maintain the name thus bestowed on him, and that compliance with such condition should be had within a reasonable time after the will became operative, and be continuous thenceforward during the period of his natural life. *Drew v. Wakefield*, 54 Me., 291; *Carter v. Carter*, 14 Pick. [Mass.], 424; *Ross v. Tremain*, 2 Met. [Mass.], 495; *Tilden v. Tilden*, 13 Gray [Mass.], 103, 109; *Ward v. Patterson*, 46 Pa. St., 372; *Schouler, Wills*, sec. 600.

It is obvious that the testator was jealous lest that particular name, and none other, should not be borne by his offspring and devisee; and, desirous of the name being maintained, uncorrupted with any other, so expressed himself in unmistakable terms. It was not incumbent on the devisee or his guardian to accept the conditions. Whether to comply with the terms of the will or not was a matter

regarding which there was freedom of action; but the devisee can not, without disregarding the provisions of the will, and doing violence to the intention of the testator, be allowed to accept the benefits conferred without complying, in truth and substance, with the conditions imposed. But viewing the matter entirely in the light of the acts and conduct of the devisee, leaving out of consideration altogether what transpired before he arrived at the age of understanding and accountability, no different conclusion can be reached. He testifies that when he was nine, ten, or eleven years of age he was informed by his mother of the conditions of the will; and it is apparent she knew well and fully its provisions from the time of its probate, December 31, 1879. He also testifies that he knew of his right name under the terms of the will when he was seventeen or eighteen years old. And yet it is as conclusively shown that at no time thereafter, until after the litigation began, did he attempt to maintain the name Finley Smith, or recognize in any way that name alone as being his true name. While there was no formal notice given either him or his guardian by the executors of the conditions named in the will, it is too obvious for discussion or doubt that they were fully cognizant of them from the time he arrived at the years of understanding, and his guardian from the time of the probate of the will. The conclusion is irresistible that the testator's intentions and his expressed conditions have been disregarded, with reference to his property passing to the devisee first named, and, because of the non-compliance with such conditions, it was his intention and direction that the property should pass to the other children named in the will, and their legal heirs; and it is the duty of the courts to give force and effect to his intentions as thus expressed. The instrument was of his making, and to properly construe its provisions and enforce them, not to change its terms or make a new will, is why resort is had to the courts by those interested in its execution.

Our conclusion is that, for the reasons stated, the find-

ing and decree can not be sustained under the evidence. The decree is therefore reversed and set aside, and the cause remanded, with direction to enter judgment in favor of those entitled to the expectant estate, in conformity with the views herein expressed.

REVERSED AND REMANDED.

JAMES A. ROSE ET AL. V. HENRY SIEKMANN.

FILED MAY 8, 1902. No. 11,807.

Confirmation of Sale.

ERROR from the district court for Adams county. Tried below before BEALL, J. *Affirmed.*

F. P. Olmstead, for plaintiffs in error.

Snider & Logan, *contra*.

HOLCOMB, J.

It is contended in this case that the trial court erred in entering an order of confirmation of a sale of real estate made in foreclosure proceedings over the objection of the defendant below. It is argued that the appraisement of the property was inadequate and "unconscionably low and unjust." The property was appraised at \$800. Two witnesses, called by defendant in error, made affidavit that the property was worth only the sum fixed by the appraisers. To overcome this showing in support of the appraisement the plaintiff in error presented affidavits of two witnesses who say the property was worth \$1,000. When the record discloses a state of facts such as just narrated, and a conflict of opinion as to value exists as it does in this case, it is difficult to discern wherein the court erred in upholding the appraisement and entering a final order of confirmation. The most that can be successfully

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urged by plaintiff in error is that the appraisers were mistaken in the value adopted by them. This alone is insufficient to justify an order vacating the appraisal. *Nelson v. Alling*, 58 Nebr., 606, and authorities there cited. Furthermore, the property sold for more than two-thirds of its alleged value as contended for by plaintiff in error. so that if it be conceded the valuation he places on the property is correct he has not been prejudiced by the appraisal complained of. *Unland v. Crane*, 63 Nebr., 451.

The order complained of is accordingly

AFFIRMED.

NATHAN PRATT ET AL., APPELLEES, V. GEORGE E. LEAN, APPELLANT.

FILED MAY 8, 1902. No. 11,829.

Confirmation of Sale.

APPEAL from the district court for Howard county. Heard below before MUNN, J. *Affirmed*.

Bell & Robinson, for appellant.

F. J. Taylor, contra.

HOLCOMB, J.

Appellant's objections to confirmation are altogether without merit and can hardly be regarded otherwise than as frivolous. It is objected that no return of the sheriff to the order of sale was filed within sixty days from the date thereof, nor at all. It is not required that the return should be made within sixty days, and the record contradicts the other statement in the motion, the return having been filed before confirmation was asked and before objections were interposed.

It is also objected that no certificates of liens were filed before the day of sale, nor at all. This is also contradicted

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by the record, which shows the appraisal of the real estate on April 17 for the purpose of sale, and a filing of a copy thereof, together with the certificates of incumbrances, in the office of the clerk of the court on the day following.

The order of confirmation appealed from is

AFFIRMED.

T. T. McDONALD V. TOOTLE-WEAKLEY MILLINERY COMPANY.

FILED MAY 8, 1902. No. 11,848.

1. **Peremptory Instruction: UNDISPUTED FACTS.** Where there are no disputed facts for the determination of the jury, it is not error to give a peremptory instruction in favor of the party entitled thereto on the undisputed facts.
2. **Evidence.** Evidence examined, and *held* that no question of negligence on the part of plaintiff is presented, such as would relieve the defendant of his liability as guarantor of the payment of the debt sued for.
3. **Liability of Guarantor.** It is not required that exclusive reliance be placed on the guaranty of a third party to pay the debt of another in order to recover on the liability of such guarantor. If the credit was extended on the faith of the guaranty this is sufficient.

ERROR from the district court for Madison county.
Tried below before CONES, J. *Affirmed.*

George F. Boyd, for plaintiff in error.

Mapes & Hazen, *contra.*

HOLCOMB, J.

This action was instituted against the plaintiff in error, defendant below, as guarantor, for a balance due on a bill of merchandise sold by the plaintiff to one Mrs. M. E. Northington. The written guaranty on which the action is grounded is as follows:

"DEAR SIR *answering* to your *inquiry* on this sheet will say I have *loaned* Mrs. Northington *Sufecient* capital to

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Start in the Business she lies Now conductin and am responsible for all Bills she contracts in her Business.

"T. T. McDONALD."

After the issues as made by the pleadings were formed, the cause was reached for trial and on the submission of the evidence the court peremptorily instructed the jury to return a verdict for the plaintiff for the amount claimed. A motion for a new trial being overruled, judgment was entered on the verdict, and to secure a reversal thereof the defendant prosecutes error. It is urged as grounds of reversal that by the peremptory instruction given, the trial court committed error in three particulars.

First it is argued in brief of counsel for plaintiff in error that the question of whether or not the person to whom the goods were sold had closed out and discontinued the business in which she was engaged when the guaranty was given, and later on began a new business to which the guaranty did not extend or apply, should have been submitted to the jury as a disputed question of fact for its determination. The answer alleged that the business which the debtor was engaged in at the time the guaranty was given had been closed out and discontinued, but later on a new business begun, during which latter period the goods, the value of which is sued for, were sold, and for that reason the defendant was not liable on his guaranty. Examination of the evidence on this point shows indisputably that the business Mrs. Northington was engaged in when the guaranty was given, was continued until some time after the bill of goods in controversy was sold. The alleged discontinuance consisted only in the purchaser, who was a milliner, closing her millinery store for a brief period during the dull summer months, a part of which time she was absent from the village in which she carried on her business. The business and the business fixtures, her store-room and goods not sold, remained as before under her custody and control, and the business actively resumed about the time of the purchase of the goods in controversy. The guaranty was given January 22, the order for the

bill of goods in controversy made August 1, and the goods sold August 20. We find no disputed question of fact on this point to submit to the jury and the trial court therefore committed no error in that regard.

It is next contended that the plaintiff was so negligent in its effort to collect the money due from the purchaser as to relieve the guarantor of all liability. It is claimed the purchaser sold her business in January following, of which fact the plaintiff was advised, and requested to forward its account against her to a local bank for collection. The evidence is uncontradicted that, immediately upon receipt of the information mentioned, the account was forwarded through plaintiff's attorneys to the bank, as requested, for collection, but before it had reached the bank the funds of the debtor had been withdrawn. It does not appear that she had at any time made any arrangement to pay the account. All that appears is that the bank held the check given as payment by the purchaser of the business to Mrs. Northington for a day or two, presumably for the purpose of collection. The application of the proceeds of the check was at all times under the direction and control of Mrs. Northington, who had sold out her business. It does not appear that the bank at any time had funds at its disposal to satisfy the balance due on the account in controversy. This certainly presents no question of negligence which in any possible view of the matter could relieve the guarantor of the liability he had assumed.

The third and last ground on which error is sought to be predicated is that the goods were sold on the strength and individual credit and standing of the purchaser and that the court erred in assuming that the goods were sold entirely on the strength of the guaranty. On this point it is sufficient to say that the plaintiff relied on the guaranty and extended credit on the faith of it. It is not required that exclusive reliance was placed on the guaranty. The seller may have relied, and probably did rely, on the credit and standing of the purchaser, as well as on the faith of

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the guarantor's ability and liability to make good any default of the principal debtor, and that it did this is beyond serious controversy.

We perceive no error in the record and the judgment of the trial court should be, and accordingly is,

AFFIRMED.

FANNIE MOSELEY, APPELLEE, v. J. M. FILLEBROWN ET AL,
APPELLANTS.

FILED MAY 8, 1902. No. 11,312.

No Merit in Appeal From the Confirmation of Sale.

APPEAL from the district court for Fillmore county.
Heard below before STUBBS, J. *Affirmed.*

Charles H. Sloan, for appellants.

John Barsby, contra.

SEDGWICK, J.

The Citizens' Bank of Geneva appealed from the confirmation of a sale of real estate in Fillmore county. There is no merit in the appeal.

The objection that the officer who made the sale was not qualified to do so is based solely upon an affidavit which says that he was not sheriff on the 24th day of January, 1900, the day of the sale. It is admitted in the brief filed that he was sheriff at the time the order of sale was issued and no reasons are given in the affidavit, nor is there any statement of facts from which it might be found that he had ceased to be sheriff. The court found that the sale was duly made by the sheriff of Fillmore county and this objection is wholly without merit.

It appears that no revenue stamp was attached to the certificate of the appraisal; but it has been several times held by this court that, under the act of congress of 1898, omission of revenue stamps from certificates in

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legal proceedings in the state courts did not invalidate those proceedings.

The decree of the district court is

AFFIRMED.

FRANK P. THOMAS V. ESTATE OF JOHN D. THOMAS, DECEASED.

FILED MAY 8, 1902. No. 11,082.

Commissioner's opinion, Department No. 1.

1. **Placing Law Case on Equity Docket Over Plaintiff's Objection:** WAIVER. Error in placing a law case on an equity docket over plaintiff's objection is waived, if at the trial plaintiff expressly declines hearing before a jury.
2. **Harmless Error.** Error in holding witness incompetent and refusing all her testimony is immaterial, if the testimony offered, together with the proofs received, shows no right of action.
3. **Illegitimate Child: PRESCRIBED EVIDENCE OF PATERNITY.** Section 31, chapter 23, Compiled Statutes, in making an illegitimate child an heir of the person who "shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child," only provided for the prescribed evidence of paternity.
4. **What Need Not Appear.** No intention to make the child an heir, and no distinct statement that it is an illegitimate child, need appear in the writing.
5. **Marital Confidence: MARRIAGE VOID AB INITIO.** A woman whose marriage with decedent was annulled during his lifetime because of the existence of a former husband at the time of the marriage is a competent witness against his estate as to facts learned otherwise than by communications from deceased during the existence of marital relations.

ERROR from the district court for Douglas county.
Tried below before FAWCETT, J. *Reversed.*

John D. Ware, for plaintiff in error.

George A. Magney, contra.

HASTINGS, C.

The dispute in this case relates to the construction of section 31, chapter 23, Compiled Statutes, 1901. The specific question seems to be whether the acknowledgment in writing, signed in the presence of a competent witness, required of the father of an illegitimate child in order to constitute the latter an heir, is simply a provision for written evidence of paternity, or whether it is a requirement of a written instrument signifying an intention of the father to change the status of the child. Plaintiff's petition filed in the county court of Douglas county, in re estate of John D. Thomas, deceased, alleges that he is the illegitimate child of John D. Thomas; that the latter, about April 8, 1876, in a writing, signed in the presence of competent witnesses, acknowledged himself to be plaintiff's father. He asked to be adjudged and considered an heir of the estate of John D. Thomas. The probate court decided against him. He appealed to the district court of Douglas county with the same result, and brings a petition in error to reverse the latter judgment. To this end he claims that the district court erred in holding that this was an equitable action, and that by so doing it deprived him of a jury trial. It appears that the action was originally docketed in the district court as a law action; that subsequently, on defendant's application, and over plaintiff's objection, it was transferred to the equity docket. It appears, however, that when the cause was called for trial parties were expressly asked if they demanded a jury, and replied in the negative. It would seem that this was a waiver of any error that might have been committed by reason of docketing the cause as one in equity.

It is next complained that the testimony of the witness Sylvia E. Thomas, was by the district court erroneously excluded on the ground that the witness was incompetent. This witness was on September 1, 1875, married to the deceased in Omaha, Nebraska, and was about April 8, 1876, the time of the transactions as to which she was in-

terrogated, living with him as his wife. On February 17, 1886, the deceased was by this court granted a decree annulling said marriage on the ground that at the time it was entered into Sylvia E. Thomas had a former husband still living. It is claimed that the marriage of the deceased, having been annulled for this reason, was as if it had never been, and that there was no incompetency on her part to testify in this action. The witness was, however, held to be incompetent, and her evidence excluded, and on this ground it is claimed the judgment should be reversed. It is insisted, on the other hand, by the defendant in error, and by the guardian *ad litem* in the action, that even if the witness was competent, and her testimony wrongly excluded, it was, nevertheless, error without prejudice. The court, at the end of plaintiff's testimony, dismissed the case without hearing any evidence on the part of the defendant estate on the ground that none had been produced on behalf of plaintiff. It is claimed that the entire transaction of alleged legitimation had been testified to by the witness Martha Haight. In order to sustain the action of the trial court, it is necessary to hold that the statements of Martha Haight, if taken as true, are insufficient to maintain plaintiff's claim. If the testimony of Sylvia E. Thomas was desired only to corroborate Martha Haight's statement, it could certainly have no greater effect than to cause the latter to be taken as true. If, as defendant claims, the evidence received and that offered, taken together, do not make a case, then it was no error to dismiss it. An examination of the testimony offered by this witness discloses that the only evidence tendered on her part was as follows:

"The petitioner offers to prove by the witness Sylvia E. Thomas that an agreement was drawn up between Mrs. Martha Haight and John D. Thomas, deceased, on the 8th day of April, 1876, being drawn up by William L. Peabody, and signed by John D. Thomas, deceased, and Mrs. Martha Haight, and was in words and figures as follows:

" "This agreement entered into by and between John D.

Thomas, party of the first part, and Martha Haight, party of the second part, Witnesseth:

“First. That John D. Thomas, the party of the first part, hereby acknowledges himself to be the father of Frank P. Thomas, the child born to Martha Haight on the 4th day of March, 1876, and in consideration of that fact, does hereby agree with the party of the second part that he will pay her the sum of \$200 in payments of \$16.66 $\frac{2}{3}$ upon the first of each month for one year, and that at the end of said year he, the party of the first part, hereby agrees to adopt the said Frank P. Thomas according to the laws of the state of Nebraska.

“Second. Martha Haight, the party of the second part, in consideration of the foregoing, hereby agrees with the party of the first part that she will at the end of one year, surrender up the said child, Frank P. Thomas, to the said John D. Thomas, party of the first part, and relinquish all rights to said child, and further agrees that she hereby relinquishes all claim and right against the said John D. Thomas, party of the first part, on account of any claim that she may have against him as being the father of her illegitimate child, Frank P. Thomas.’”

The witness Martha Haight testified to the drawing up of an agreement by William L. Peabody of that date, and its signature by herself and by the deceased, and that she and the deceased and Mrs. Sylvia E. Thomas and Mr. Peabody were all present. Martha Haight also testified that the paper “read that he was to pay me so much a month until Frank was a year old, and then he acknowledged,—he said that he was the father of the child, and that he would take it at the end of the year,—why, he would take it and take it to his own home and have it adopted to him, because he said that he was abler for to do for it than I was, and Mr. Peabody drew up the writing to that effect that Mr. Thomas was to pay me so much a month until the child was a year old, and then that he was to take it and take care of it and see that it was well done by.” In response to the question, “Have you stated all that that

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written instrument contained?" she replied, "Well, only about the most particular part of it; Frank's name and his age was in there." "State all that you remember, whether it is particular or not?" "Well, the most of it that he was to take him, and he acknowledged he said that he was the father of the child, that he had no right to dispute it, and he said that he would take him and adopt him." It would seem that the statements of Martha Haight covered all the essential matter embraced in the offer of testimony by the witness Sylvia E. Thomas. If the facts stated by Martha Haight, taken as true, established no right on the part of plaintiff as an heir of deceased, the mere signing without attestation or delivery of the agreement offered to be proved by Mrs. Thomas would show none. It is not necessary, therefore, to consider this objection further until it is decided whether the facts offered would have availed anything if found true.

The third and final objection to the action of the trial court is that it sustained the defendant's motion to dismiss the proceeding at the end of plaintiff's testimony on the ground that there was no evidence tending to establish his claim of legitimation. This claim rested on the testimony of Mrs. Dollie Winters, the claimant's half sister, who testified that on one occasion she asked the deceased the claimant's age, and was told by him that claimant was then thirteen years old, and the deceased added: "Any time you lose his age I have the papers that were drawn up between me and your mother; it is right in the trunk,"—and he pointed to the trunk. Witness also testified to his buying clothes and school books for the claimant. Martha Haight testified that the claimant was the son of John D. Thomas; that he was born March 4, 1876; that she was then an unmarried woman and was never married to John D. Thomas; that she was present in William L. Peabody's office in Omaha, Nebraska, about April 8, 1876, and the transactions occurred as to which her statement has been given; that the deceased paid her the \$16.66½ monthly for one year as agreed; that she had never seen

the writing since the time of its signing when the deceased took it; that this writing was signed on the next day after she had entered a complaint against John D. Thomas for bastardy. Demand had been made for this writing upon the administratrix and her counsel. She and they denied all knowledge of it. It is claimed by them to be void because not delivered, not attested, and so not fully executed. It is also objected that it does not state that Frank P. Thomas was an illegitimate child, nor express any intention to make him an heir, and that, taking the agreement to have been as was offered to be shown by Mrs. Sylvia E. Thomas, such legitimation was to be by a subsequent adoption, which never took place. If this statute is to be taken as merely requiring a particular form of evidence of paternity in order to render any illegitimate child competent to inherit and only one that shall comply with the bare terms of the law, then the dismissal was erroneous. There was certainly competent evidence of such a writing having been in existence. It is true that, as tendered in proof, this agreement was a mere incident to the settlement with the mother. There is, however, proof given and tendered that there was a writing, signed by John D. Thomas in the presence of witnesses competent to testify, in which he acknowledged himself to be the father of claimant. It is earnestly contended on the latter's behalf that this is all that is required.

In this view counsel are strongly supported by the case of *Blythe v. Ayres*, 96 Cal., 532. That court is expressly construing this same statute, and holds that holographic letters of the decedent, whose signing was seen by competent witnesses, were a sufficient compliance with the requirements of the law. This conclusion, so far as it rests on the ground that this statute was intended to permit any child born out of wedlock to inherit from his father, if he could prove his parentage in this way, was without dissent. The California court cites two holdings from Louisiana that the somewhat similar provisions of the Louisiana Code, drawn from the civil law, are simply to

provide a means of evidence. In *Succession of Fletcher*, 11 La. Ann., 59, 60, the decedent had made a deed of manumission of a slave, describing her as his "natural daughter slave," and executed it with all the formalities necessary in acknowledging the parentage of an illegitimate child. It was held to have that effect in addition to its manifestly intended one of setting her free. In *Remy v. Municipality No. 2*, 11 La. Ann., 148, 159, the same effect was given to a will which contained an acknowledgment of paternity, and had been executed in the manner prescribed for such acknowledgments. Both are supported by French citations to the effect that only evidence of paternity of a particular kind is required. In *Gaines v. Hennen*, 24 How. [U.S.], 553, 602, these provisions as to acknowledgment are discussed and traced to Justinian's Novel, 117, and held to provide only for such specific evidence. Some cases are cited from Pennsylvania in which the statute requiring only that wills shall be executed in presence of two witnesses is held not to require any signature or attestation by them. *Combs' Appeal*, 105 Pa. St., 155, 159; *Camp v. Stark*, 81½ Pa., 235, 238. A similar holding that no more formalities can be required than the legislature has expressly provided appears in *Will of Smith*, 52 Wis., 543, 547, and in *Welch v. Adams*, 63 N. H., 344. It is to be said, however, that in *Beach v. Botsford*, 1 Doug. [Mich.], 199, 40 Am. Dec., 45, a requirement that a confession of judgment must be in writing, signed in presence of the justice and one or more competent witnesses, is held to require their attestation. In *Pina v. Peck*, 31 Cal., 359, the court, with the concurrence of only three members,—the other two apparently not sitting,—held that a will duly signed and witnessed, describing the legatee as "my daughter," and bequeathing to her personal property, was of no force to enable the natural child to inherit real estate, because not made with the intention to legitimate her and so not within this statute. The decision is placed on the ground that the statute is in derogation of the common law, and so is to be construed strictly. This case is expressly overruled in

Blythe v. Ayres, *supra*, because, first, it was concurred in by only three justices; and, second, because since its decision the statute had been incorporated into the California Code, together with a provision that the Code should be liberally construed, and not with reference to the common law. If this statute is to be construed as simply providing for special evidence of paternity, the fact that the writing was never delivered would seem to be without importance. Neither had the will ever been delivered in *Remy v. Municipality No. 2*, *supra*. It would not matter who had it if it was simply evidence of paternity. If, however, an intention to change the status of the child is required on the father's part, if the writing was in the nature of a grant of inheriting capacity, and to be effective must evince an intention of the deceased to make the claimant one of his heirs, then his retention of it would show that such intention was imperfect, and that he desired still to retain his control of the matter. The non-delivery of a memorandum sufficient to satisfy the statute of frauds, is held to vitiate it, for the reason that it shows an imperfect execution, and to pass rights there must be such a delivery as places the instrument beyond the control of the maker. *Wier v. Batdorf*, 24 Nebr., 83. If, as defendants in error claim, an instrument for the express purpose of acknowledging the claimant was necessary, he has no right. The writing itself, in providing for a future action of the deceased which should confer on the claimant the rights of a legitimate child, clearly negatives any intention to do so by means of the agreement then made with the mother. The retention of the instrument would be a further indication of lack of such then present intention. Ordinarily, of course, the intention to give a natural child the right of inheritance would concur with the making of the instrument. The cases in which there would not be such concurrence would be comparatively few. The question seems not to have arisen in Maine, where this statute has been in use since 1838 at least. Laws of Maine, 1838, ch. 338. In Nebraska the first territorial legislature

adopted the Iowa statute that an illegitimate child should inherit from one who should acknowledge him as a child, but such recognition must have been general and notorious, or else in writing. Session Laws, 1855, p. 75. In 1856, another statute was passed allowing illegitimate children to inherit only on the intermarriage of the parents and the father's acknowledgment of parentage. Session Laws, 1856, p. 125. In 1860, the present law was enacted. Session Laws, 1860, p. 64. As shown in the California cases, the question here is one of construction. It would seem that the common law of this subject is pretty thoroughly eliminated in Nebraska. There are some few cases in this country which adopt the rule that, in passing upon the rights of illegitimate children to inherit a strict construction must be followed, as all such rights are statutory. At common law the illegitimate, like the alien, had no heritable blood. The construction as to the alien is that, unless he is expressly mentioned, he has no part in statutes of descent. *Stemple v. Herminghouser*, 3 G. Greene [Ia.], 408; *Crane v. Reeder*, 21 Mich., 24; *Orr v. Hodgson*, 4 Wheat. [U. S.], 453. The rights of illegitimate children have sometimes been treated in the same way. *Pina v. Peck*, 31 Cal., 359; *Furgeson v. Jones*, 17 Ore., 204. In *Hunt v. Hunt*, 37 Me., 333, in construing this same statute, the court says: "Who are entitled to inherit as heirs of a deceased person, is, in this state, to be determined only by the provisions of the statute in force at the time of his decease. No rules of the civil or common law, further than they are adopted by the statute, can afford them the least aid." Generally, the courts hold that statutes for the relief of illegitimate children should have at least a fair construction. *In re Jessup*, 81 Cal., 408; *Blythe v. Ayres*, 96 Cal., 532; *Dickinson's Appeal*, 42 Conn., 491; *Swanson v. Swanson*, 32 Tenn., 446. Even the alien, when expressly mentioned, is given whatever the statute clearly calls for. It is to be noted that the statute merely calls in this instance for an "acknowledgment" of a fact. It makes the illegitimate child "an heir of the person who

shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child." If no more is asked of this son than the statute by its terms requires, he is entitled to a share of his father's estate if the evidence given and offered on his behalf is true. Whether or not it is true, he is entitled to have a jury decide if this statement of his father's is required merely as evidence of his paternity. Such we conclude it is. The question which was not decided in *Lind v. Burke*, 56 Nebr., 785, it seems to us should be decided in the negative. No intention or desire that the child should become an heir seems needed if his father is pointed out by an acknowledgment of the paternity in the latter's own hand, signed in the presence of a competent witness. Neither does it seem that the court should add to this statute any requirement of delivery of this evidence, or that it be expressly mentioned that the child is illegitimate, or that the witness attest the writing. The statute might require all this, but by its terms does not.

Since, under this conclusion, a new trial will be necessary, the question as to the competency of Mrs. Sylvia E. Thomas to testify must be examined. As above stated, in April, 1876, she was living with deceased as his wife. In 1886 her marriage to him was by this court annulled on the ground that when it was contracted she had a former husband living. It does not seem to be disputed that at the time her testimony was tendered she was a competent witness. It had long been found that the marriage to Thomas had never been a lawful marriage, and as soon as this was legally established, the supposed wife became a competent witness against her supposed husband. *Miles v. United States*, 103 U. S., 304, 314. The marital privilege, however, would still apply to all communications made by the deceased while maintaining innocently marital relations with the witness. It is sought to claim that the evidence tendered in this case was so obtained. The objection, however, was to the competency of the witness to testify to any transactions of her supposed husband.

In sustaining this objection the court went beyond the rule established in section 332 of the Code of Civil Procedure, which only prohibits testimony as to communications of one to the other while married, and applied section 331. In this the trial court seems to have erred. Section 331, disqualifying the witness, seems to apply only while the relation subsists. In this case it had been doubly dissolved by annulment and death. 1 Greenleaf, Evidence, sec. 338. It is earnestly claimed that even section 332 does not apply, and Greenleaf's Evidence, volume I, section 339, is cited to uphold the contention that, where no lawful marriage existed, even communications are not privileged. Greenleaf does not fully sanction the doctrine, and we do not think it is in accordance either with section 328 or with section 332 of our Code of Civil Procedure. It does not seem, however, that the transaction of making this agreement with Martha Haight in the presence of Peabody should be regarded as a private transaction between husband and wife, or what she saw and heard of it, as a communication, so far as the facts are shown in this record. *Bigelow v. Sickles*, 75 Wis., 427. A thorough examination of the proposed witness on her *voir dire* should be made, and no evidence of facts learned by communications from the deceased while they held the relation of husband and wife should be permitted. What she learned otherwise than through her husband's communications to her would, however, seem competent.

It is therefore recommended that the judgment of the district court be reversed, and the cause remanded for further proceedings.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

HATTIE S. BRINKWORTH ET AL. V. ALFRED HAZLETT, RECEIVER.

FILED MAY 8, 1902. No. 11,679.

Commissioner's opinion, Department No. 1.

1. **Receiver: EXECUTION: RETURN NULLA BONA: STOCKHOLDER'S LIABILITY: CONDITION PRECEDENT.** It is not necessary that a receiver of an insolvent bank procure executions against himself and a return of *nulla bona* on all claims against the bank before commencing action to enforce stockholder's liability.
2. **Action: DEFENSE.** In such action misconduct of the receiver and his possession of unreported assets is no defense.
3. **Conflicting Evidence: FINDING.** Where evidence is merely conflicting, finding of the trial court that a party was owner of certain shares in the bank at the time of insolvency will not be disturbed.
4. **Claim: BASIS OF ACTION.** The "claim," which can furnish the basis for an action to compel a devisee to return a portion of estate assigned to him by proper probate proceedings, must be one allowed in the probate court, or "established" by proper legal proceedings elsewhere, as a liability of the estate involved.

ERROR from the district court for Gage county. Tried below before LETTON, J. *Affirmed in part.*

Ernest O. Kretsinger, for plaintiffs in error.

G. M. Johnston and *Fulton Jack*, *contra.*

HASTINGS, C.

Mrs. Delia B. Hotchkiss was owner of four shares of capital stock of the American Bank of Beatrice, of par value of \$100 each. The bank failed, and closed its doors July 1, 1893, and the state banking board took possession. A bond in the sum of \$100,000 was given by the bank and its officers and the assets turned back and nine months allowed for voluntary liquidation. The liabilities were not paid and March 1, 1899, defendant in error was appointed receiver and took charge of the assets. Mrs. Hotchkiss died on July 2, 1897, in Gage county. She was pos-

sessed at the time of her death of real and personal property in the county more than sufficient to pay all her debts, including any liability to the American Bank or its creditors on account of this stock. August 30, 1897, a petition to probate the will of Mrs. Hotchkiss was filed. September 24, 1897, was fixed as the day of hearing, and due notice given, and on that day the will was admitted to probate and administration with will annexed was granted to W. H. Mahanah. He gave bond, took his oath and assumed the duties of administrator the same day, and on the same day six months were allowed for filing of claims against the estate, and the first Monday in June fixed as the time for hearing them. An order was entered that notice of this be given by publication in the *Beatrice Weekly Express*, which was done. March 25, 1899, the administrator petitioned to be discharged and for settlement of his account. His petition was set for hearing April 21, 1899, and notice was given. On that day the account of the administrator was settled and, according to the terms of Mrs. Hotchkiss's will, \$537 was ordered distributed to Mrs. Bridges, her daughter, and plaintiff in error here. A like sum was allotted to Mrs. Brinkworth, the other plaintiff in error, and \$53.94 to the Congregational Church of Beatrice, and \$104 to the Congregational Church of Odell and some real estate to another daughter, Mrs. McMahon. In the meanwhile, on June 27, 1898, the receiver had reported the assets of the bank exhausted and its liabilities to a large amount unpaid, and had been ordered to bring suit to enforce the liability of the stockholders. November 15, 1898, the receiver filed a petition in the district court of Gage county against fifty-nine persons and corporations, setting out the incorporation and the insolvency of the bank, his receivership, the disposition of the assets, the remaining liabilities of the bank and that the defendants were stockholders either in their own right or as transferees and successors in trust. Among the defendants Delia B. Hotchkiss was named. She was already dead, as has been seen. June 22, 1899, an amended and supple-

mental petition was filed, setting out her death, the appointment of her administrator, that he received \$1,450 of personal property, and paid \$214 expenses, and distributed the rest as above stated, and was discharged on May 12, 1899, on filing his receipts, and that a lot in Beatrice was assigned to Mrs. McMahon. Four hundred dollars was claimed from these distributees on account of Mrs. Hotchkiss's liability as a stockholder. Summons was issued on the supplemental petition for Mrs. Bridges, Mrs. Brinkworth, the two churches and Mrs. McMahon. No service was obtained upon the latter nor upon the church of Odell. The service upon the Congregational Church of Beatrice was upon Hugh J. Dobbs, trustee. There was no appearance by any of these last three. Mrs. Brinkworth and Mrs. Bridges answered, denying generally; alleging the receiver had funds of the bank not accounted for, the execution of the \$100,000 bond and the turning of the assets over to the obligors without Mrs. Hotchkiss's consent, the sufficiency of the bond to provide for all claims, and that this action without her assent released Mrs. Hotchkiss; that the receiver's authority was disputed by the creditors who were most of them looking to the bond; improper settlements with debtors of the bank; the statute of limitations; and the administration of Mrs. Hotchkiss's estate with no claim filed against it and that thereby all claim against them was barred. In the same action John Warren had answered previously, denying generally, setting out the same defenses as to the action of the receiver in managing the estate and in addition had claimed negligence in not proceeding against the estate of Delia B. Hotchkiss. He also alleged that his daughter, Florence Warren, in 1888 became owner of ten shares of the stock and subsequently five more were issued to her, in consideration of work for the bank as bookkeeper; that she died in 1891 and before her death gave the stock to her brother and sister; that after her death, against Warren's objection, this stock was taken up and a new certificate issued to him; that he, on behalf of his son and

daughter, the true owners, traded this stock, before any liability accrued on it, to one Frorer and the consideration was turned over to the true owners and the stock assigned and requested to be transferred on the bank's book, and, if it was not done, no fault nor liability attached to him, Warren. This answer of Warren's seems to have led to the proceedings against the beneficiaries under Mrs. Hotchkiss's will. Replies were filed denying the new matter in the answers and denying the sufficiency to constitute a defense, of the allegations of funds in the receiver's hands, and of the various allegations as to the previous management of the trust. The court found the bank insolvent and that the receiver had exhausted its assets and obtained an order to proceed against the stockholders; found the liabilities as alleged; found that Mrs. Hotchkiss and John Warren were owners, respectively, of four and fifteen shares in the bank when it failed, and liable for \$400 and \$1,500, respectively. The court also found that Mrs. Brinkworth and Mrs. Bridges each received \$537.37 from Mrs. Hotchkiss's estate and the Beatrice Congregational Church \$53.74 and that each of them were liable for the whole \$400 on account of Mrs. Hotchkiss's shares, not exceeding, however, the amount received by each. There were findings, also, as to the rest of the stock, that each holder was liable in this action for the face amount of it, and judgment was entered against each holder for the amounts named, with a proviso, as to Mrs. Brinkworth and Mrs. Bridges and the Beatrice Congregational Church, that the recovery from each was not to exceed the amount found to have been received from Mrs. Hotchkiss's estate.

There are fifty-five assignments of error, but in the brief only four are urged: First, that there can be no recovery against Mrs. Brinkworth and Mrs. Bridges because of the failure to file any claim against the estate of Mrs. Hotchkiss while it was in progress of administration; second, that John Warren was not a stockholder in fact, and not liable as such; third, that there was error in holding that the defendants should not be permitted to prove assets

still in the hands of the receiver unaccounted for by him and losses through his negligence; and in addition to these three, that the record does not show executions issued and returned unsatisfied on each of the various judgments against the bank and the receiver.

It is claimed that the failure to allege such executions is fatal to the receiver's pleading, and the failure to prove it, to any recovery. It is admitted that three such executions, issued and returned in 1895, were shown; but it is claimed that this is not sufficient, but that the issuance and return of executions should have been alleged and proved as to each of the claims. This last assertion of error hardly seems to require further consideration. If the action were brought, as is permitted by some statutes and practiced in some jurisdictions, directly by the creditor, it might be required of him to show an execution against the bank before assailing a stockholder, as such. But surely a receiver ought not to be required to issue and pay for executions against himself in order to make sure he has no trust funds still in his hands. If the statute expressly required such an absurdity, it would have to be gone through with. It would hardly be worthy of a court to require it by judicial construction.

The complaint that there were, or ought to be, funds applicable to these debts still in the receiver's hands, does not appear any better founded. The creditors were entitled to have the stockholders respond if the assets of the bank were in fact gone, if they were gone without such fault on the creditor's part, as discharged the debt. There seems no more reason for holding that the orders approving the receiver's reports, and the finding that the resources of the bank were exhausted, were disputable in this action, than for a like holding as to the creditor's judgment against the bank and its receiver. The receiver was no more an adverse party to the stockholders in disposing of the property than he was to the creditors in proving their claims. If either suffered damage by his wrong-doing, they had a remedy on his bond.

The question as to John Warren is simply one of fact. Was he, or was he not, a stockholder under the evidence in the case? The trial court found he was and his counsel claims the evidence does not sustain the finding. His daughter, Florence, who died in 1891, had at that time fifteen shares. Warren testifies that she orally assigned these shares to her brother and sister. He made out a release or assignment to the bank dated May 25, 1891, as "sole heir and legal representative of Florence Warren." He says this was done at that date, but later, but does not deny executing the assignment. A new certificate in his own name was made, which he says he objected to, but finally took. He admits his signature to a receipt for it to the bank. There is evidence tending to show he received a dividend July 1, 1892, though he denies this. In that year, or early in the next, he traded the new certificate to one Frorer, of Lincoln, Illinois. This trade was completed only after the closing of the bank and Warren then, in August, or later in 1893, assigned the certificate. The most that can be said as to this evidence is that it is conflicting and the trial court's decision should not be disturbed.

The first point made has been left until the last, because it has caused the most difficulty here, as it did evidently at the trial. The trial court, on June 12, 1899, at a hearing as to a claim of defect of parties defendant, found that the legal representatives of Delia B. Hotchkiss were necessary parties, and entered an order requiring the receiver to make the legal representatives of Delia B. Hotchkiss parties. June 22, 1899, supplemental petition was filed against the legatees, as before stated. It is claimed that the finding against these legatees can not be supported, because the claims were not presented against the estate and were barred by the six months' notice and order barring claims. Compiled Statutes, ch. 23, sec. 226. Defendant in error, however, says that the claim at the time of the bar was a contingent one, and only became absolute and enforceable for a definite sum when the assets

of the bank were exhausted and the liabilities left unpaid. *Farmers' Loan & Trust Co. v. Funk*, 49 Nebr., 353; *Van Pelt v. Gardner*, 54 Nebr., 701. This made it a contingent claim. *Stichter v. Cox*, 52 Nebr., 532. As a contingent claim it was not barred. It might be presented to the probate court, or to the executor or administrator, at any time within two years after the time limited for presenting claims. Compiled Statutes, ch. 23, sec. 260. If it did not accrue within two years it might be presented at any time within a year after it accrued. Sec. 262.

It remains to be considered, however, whether the fact that an action remained against the estate authorized the making of the legatees parties without proceeding to establish the claim against the estate, as such. The legatees, merely as such, would not be proper parties to this action. If, as the court found, it was necessary that the estate of Delia B. Hotchkiss be a party to the proceedings, a new administrator must be appointed for such purpose. The legatees, even if all were made parties and served, would not do as personal representatives of the deceased. They would have no authority to act jointly. They could only be made parties under the provisions of sections 263 and 266 of the statute cited. These sections appear to contemplate the establishment of a claim against the estate first. Section 263 expressly provides for a liability of heirs, devisees or legatees who have received property "when a claim shall be presented within one year from the time when it shall accrue and be established, as mentioned in the preceding section." The "establishment," as shown by reference to sections 261 and 262 of the statute cited, is by allowance in the probate court or on appeal from it. Section 266 closes with the provision that "no such action shall be maintained unless commenced within one year from the time the claim shall be allowed or established." Clearly neither of these sections contemplate an action against an heir or devisee until the claim is "established" against the estate. No doubt, as ordered by the trial court, the personal representative of the deceased stockholder

was a proper party, and if an administrator had been appointed and made a party here, and the result had been the same finding of liability on this stock that resulted, beyond all doubt, when such result was certified to the county court, the claim would have been "established," and the basis laid for demanding a return of so much of the estate from any legatee who had received it. Defendant in error cites *South Milwaukee Co. v. Murphy*, 88 N. W. Rep. [Wis.], 583, to the effect that the action may proceed directly against the recipients of the estate. The Wisconsin statute, however, on which the court was acting in that case, contains no such provisions as ours as to an established claim. Moreover, it is not a statute regulating descent and distribution but a code provision as to civil actions.

It seems clear that the basis of a proceeding against an heir or devisee to recover property assigned him by the probate court, is an allowed or established claim. As the time is now gone by for presenting such claim, it is recommended that the decree of the trial court as to the legatees of Delia B. Hotchkiss be reversed and the action dismissed as to them, and as to all the other matters in the decree that the same be affirmed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the trial court as to the legatees of Delia B. Hotchkiss is reversed and the action as to them dismissed, and as to all of the other matters in the decree the same are affirmed.

JUDGMENT ACCORDINGLY.

STATE OF NEBRASKA, EX REL. CYRUS E. WATSON, DEPUTY
LABOR COMMISSIONER, v. LAURENCE N. ESKEW, AS-
SESSOR.

FILED MAY 8, 1902. No. 12,614.

Commissioner's opinion, Department No. 1.

1. **Assessors: ADDITIONAL DUTIES: COMPENSATION: VALIDITY OF STATUTE.** It is no objection to the validity of a statute, imposing an additional duty on assessors, that no special provision for their compensation is made.
2. **Deputy Labor Commissioner: CONSTITUTIONALITY OF LAW.** The act of 1887, imposing the duties of labor commissioner on the governor of the state, and providing for the appointment of a special deputy to assist in discharging them, is not in violation of section 26, article 5 of the state constitution.
3. **Labor Statistics: CONSTITUTIONALITY OF LAW.** The amendatory act of 1897 to sections 2066 and 2068 of Cobbey's Consolidated Statutes, requiring assessors to procure certain labor statistics, is germane to the provisions of the original act, and to the requirement of the original section 2066, that the deputy commissioner collect statistics, and is not in violation of section 11, article 3 of the state constitution.

ORIGINAL application for a writ of mandamus to compel the respondent, as assessor, to collect certain statistics.
Writ allowed.

Frank N. Prout, Attorney General, Norris Brown, and William B. Rose, for relator.

F. A. Boehmer, contra.

HASTINGS, C.

This is a mandamus to compel the collection of certain statistics by the assessor of Lancaster precinct of Lancaster county. By the act of April 13, 1897, entitled "An act to amend sections 2066 and 2068, and to create a new section to be numbered 2071, of Cobbey's Consolidated Statutes of Nebraska, 1893, and to repeal sections 2066 and 2068 as they now stand" (Session Laws, 1897, p. 247), township and precinct assessors are required to enroll all

persons over twenty-one years of age in their respective precincts, together with their occupation. Assessors are also required to return the products of farms or manufactories during the previous year, and the wages received by wage workers. The respondent refuses to perform this duty for the reason that the act in question is, as he claims, unconstitutional and void. The grounds of this claim are that the original act of 1887 was and is unconstitutional and void because contrary to section 26 of article 5 of the state constitution, in that it creates an executive office, contrary to the inhibition of that article. It is further claimed that the amendatory act of 1897 is void for the reason that it not only attempts to amend a void act, but is not germane to the provisions sought to be amended, and hence its subject is not expressed in its title. It is further objected that the act of 1897 is void, because no compensation is provided for the assessor's work.

This latter claim is not well founded. The compensation attached by law to an office is payment for all the services required of the incumbent. *State v. Meserve*, 58 Nebr., 451. Moreover, the compensation provided for assessors is a per-diem. The act of 1897 did not change the number of hours in a day any more than it did the length of the hours. No reason is perceived why \$3 per day is not just as adequate compensation for taking industrial statistics as it is for taking enumerations of property. If more days are required, the bill of the assessor will doubtless be that much larger. He would hardly need the encouragement of a special provision for compensation to induce him to claim it.

To the proposition that the act of 1887 established the office of labor commissioner in violation of section 26, article 5 of the constitution, the cases of *State v. Poynter*, 59 Nebr., 417, *State v. Burlington & M. R. R. Co.*, 60 Nebr., 741, and *State v. Fremont, E. & M. V. R. Co.*, 60 Nebr., 749, are cited, together with *Smyth v. Ames*, 169 U. S., 466, 171 U. S., 361. The first of the above cases,—*State v. Poynter*,—holds chapter 47 of the Session Laws of 1899 to be un-

constitutional for the reason that it provides, with reference to insurance companies, for a mode of taxation not in harmony with the state constitution. It holds that these provisions were the inducement to the passage of the rest of the bill, and therefore that the entire act falls with the provision relating to taxation. A somewhat careful examination of the opinion fails to disclose any suggestion that the act in question was void because providing for an insurance commissioner, and so in conflict with section 26 of article 5 of the state constitution. *State v. Burlington & M. R. R. Co.*, *supra*, finds that chapter 60 of the Session Laws of 1887 is void, because in the form in which it was finally enrolled and signed it was never passed by either branch of the legislature. The *Elkhorn Case* is simply a reaffirmance of the preceding one. The applicability of *Smyth v. Ames* to the case under consideration is not perceived. The only conclusion in it which seems to have relation to the matter in hand is the proposition that an unconstitutional act is void.

The form of the act of 1887, "to provide and continue a bureau of labor and industrial statistics and define the duties of its officers" (Session Laws, 1887, ch. 47), was unquestionably adopted to avoid the provisions of the state constitution (section 26, article 5) that no other executive state office should be continued or created, and that the duties devolving upon officers not provided for by the constitution should be performed by the officers therein created. The objection to the act is that it authorizes the governor, who is named as commissioner, to perform his duties, as set forth in the act, by deputy. It amounts to a contention that the authorization of deputies for the state officers, named in the constitution, is prohibited. The statement of the proposition seems to carry with it its own refutation. The practice of employing deputies in such offices has not arisen since the adoption of our constitution of 1875. It was certainly well known to the distinguished men who drafted that instrument, as well as to the voters to whom it was submitted. If they had meant to forbid

any such practice, they would have done so in direct terms. The objection that the act is unconstitutional because the duties provided in it may be performed by deputies, can not be sustained.

The other objection raised is to the constitutionality of the amendatory act. The basis of the objection is that it is not germane to the sections proposed to be amended, and therefore its subject is not indicated in its title, and that it is consequently a violation of section 11, article 3 of the state constitution. The title of the amendatory act is given above. It purports to amend two sections and add another to Cobbey's Consolidated Statutes of 1893. and to repeal the two sections as they then stood. The chapter in which these sections occur in Cobbey's Statutes is headed "Labor" and consists of the act of 1887, before discussed, with some other provisions. The amendment to section 2066 consists in the insertion bodily into this section of a provision for the posting up in factories and workshops of the laws and regulations with reference to child labor, hours of labor, and provisions for health and safety of the employees, and the establishment of a penalty for destroying such notices, which had previously formed section 2068. For section 2068 was substituted the provisions for collecting statistics on the part of the assessors as above stated, and a provision that these should be returned to the county clerk, who should forward summaries of them to the deputy commissioner. These statistics are to be compiled by the deputy commissioner in his biennial report to the governor. Of course, if these new provisions are germane to the matters contained in the original sections, they are sufficiently covered by their title as an amendatory act. *Dogge v. State*, 17 Nebr., 140; *State v. Berka*, 20 Nebr., 375. In *Miller v. Hurford*, 11 Nebr., 377, 381, cited by respondent, a section of the revenue law, which originally provided that taxes upon real property should be a perpetual lien, was under consideration. It was held that any amendment in relation to the lien or its enforcement would be valid. In this case the original

section 2066 provided for the gathering of facts and statistics by the deputy commissioner. The new act provided for the furnishing him with such facts and statistics through county clerks and assessors. Section 4 of the original act contained extensive provisions as to the collection, collation and publication of such facts. The requirement that these precinct officers should assist in this process seems entirely germane, not only to the other provisions of this act, but to the especial one of original section 2066 as to the gathering of statistics by the deputy commissioner, and seems to be covered by the comprehensive title of the original act, "To provide and to continue a bureau of labor and industrial statistics." No act of the legislature should be held unconstitutional unless such holding is clearly requisite to a fair and full application of constitutional requirements to such legislation. In this case it does not seem necessary. To maintain a bureau of statistics, it is clearly necessary that some one gather them; and to a provision that a deputy labor commissioner shall do so it seems that an amending provision that it shall be the duty of assessors is germane.

We do not find the original act or the amendment void for any of the reasons urged, and it is recommended that the peremptory writ of mandamus prayed for in this case be allowed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the peremptory writ prayed for in this case is allowed.

WRIT ALLOWED.

MICHAEL GOREY ET AL. V. CATHERINE KELLY ET AL.

FILED MAY 8, 1902. No. 10,777.

Commissioner's opinion, Department No. 1.

1. **Liquor-Seller: CIVIL DAMAGES: LOSS OF SUPPORT: INSTRUCTION: CONTINUITY OF INTOXICATION.** Instruction that plaintiffs in action against liquor sellers are entitled to compensation for loss of support caused by the husband and father's intoxication from all who sold or gave him the liquor causing such intoxication, *held* not to assume improperly any continuity of such intoxication.
2. **Meaning of "Support," as Used in Statute.** Instruction that "support" in the statute as to intoxicating liquors does not mean the bare necessities of life, but such means as would enable plaintiffs to live in a "style and condition and with a degree of comfort suitable and becoming to their stations in life," *held* proper.
3. **Instruction.** Instruction that the furnisher of any part of liquor causing the loss of support is liable to the full extent of the loss, approved.
4. **Evidence.** Evidence examined and *held* sufficient to uphold verdict for plaintiffs for \$400.

ERROR from the district court for Dodge county. Tried below before MARSHALL, J. *Affirmed.*

F. Dolezal, for plaintiffs in error.

Enos F. Gray and *Vesta Gray*, *contra.*

DAY, C.

Catherine Kelly and her minor children brought this action in the district court for Dodge county against Michael Gorey et al. to recover damages to their means of support in consequence of the defendants having sold intoxicating liquors to Martin Kelly, the husband of said Catherine, and the father of said minors. The period during which the plaintiffs allege they were deprived of support by reason of the intoxication of the husband and father, was from April 15, 1893, to March 24, 1897. The

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answer of the defendants was a general denial. There was a verdict and judgment for \$400 in favor of the plaintiffs, to review which the defendants have brought the case to this court by proceedings in error.

It appears that the defendants during the period above named were conducting the "Mike Gorey" saloon in North Bend, Nebraska. The first two years of this period the license for the saloon was in the name of Michael Gorey, the third year in the name of Michael Chapman and the fourth year in the name of James Gorey. The other two defendants, John and Patrick Gorey, were not licensees, but they were at all times hereinbefore referred to at that saloon habitually making sales and assisting in running it, and at short intervals during the entire period all of the defendants indiscriminately sold intoxicating liquors to the said Martin Kelly. It also appears that during the entire period, Martin Kelly was very frequently at the saloon, drinking, and that he there obtained bottles of whiskey which he took to his home and drank. Some of the witnesses swear that he was at the saloon three times a week buying and drinking intoxicating liquors. While it appears that he obtained some liquors elsewhere, it was shown that most of his liquor was procured at that saloon.

There is no dispute in the evidence that on October 14, 1891, Catherine Kelly was married to Martin Kelly, and that the minor children named as plaintiffs are the fruits of said marriage and that the said Catherine Kelly since her marriage, and the said minor children since their birth, have been dependent upon the husband and father for their means of support, and that they together constitute one family. The evidence also shows that prior and up to April 15, 1893, Martin Kelly was an industrious man of twenty-six years of age, engaged in farming, comfortably fixed to support his family, and was earning and furnishing to their support about \$400 a year, and, in addition thereto, accumulating some property; that during the years complained of he became addicted to the habitual use of intoxicating liquors, and was drunk or sick from

the effects of his excessive drinking more than half of the time, and was wholly unfit, by reason of his intoxication, to perform any labor; that he became dissolute, idle and improvident, neglected his farm and business, and during the entire period of four years contributed to the support of his family but \$400; that Mrs. Kelly had been compelled to provide for her own wants and for her children, and that she supported herself and children by her individual labor. It was also shown that \$400 a year was reasonably necessary to support the plaintiffs.

One of the errors assigned relates to the giving of instruction No. 6, which is as follows: "6. You are instructed that as the wife and children of the said Martin Kelly the plaintiffs are legally entitled to support from him and that under the laws of this state, if by reason of intoxication or intemperance in the use of intoxicating liquor on the part of the said Martin Kelly the plaintiffs have been injured in their means of support to the extent of such injury, to be ascertained from the evidence they are entitled to compensation in damages from the person or persons who sold or gave to him the intoxicating liquors which in whole or in part caused such intoxication or caused or fostered such intemperance." The criticism is made that this instruction assumes that the disqualification was continuous. This contention is not, in our opinion, supported by a fair construction of the language used by the court. The instruction is clearly within the rule announced by the repeated decisions of this court. In *Elshire v. Schuyler*, 15 Nebr., 561, this court held that the statute regulating the traffic in intoxicating liquors in effect declares the act of producing intoxication a wrong, and makes every one who has contributed to it by furnishing intoxicating liquors a wrongdoer, and liable. In that case it was also held that where, by reason of intoxication, a husband is rendered incapable of providing for his family, the wife may recover against the person furnishing the liquors for the loss of means of support during such intoxication. In *Jones v. Bates*, 26 Nebr., 693, it was held

that a married woman and her minor children, constituting one family, might join in an action for the loss of means of support, caused by the intoxication of the husband and father against those who furnished him intoxicating liquors, and that all persons who furnished intoxicating liquors which contributed to the intoxication may be joined as defendants. In *Wardell v. McConnell*, 23 Nebr., 152, it was held that, where intoxicating liquors were sold to one who is disqualified to earn a support for his family by reason of his intoxication, the liability attaches and continues throughout the period of such disqualification, whether the same terminates during the license year or continues for a longer time, and that there could be no apportionment of the damages among the different defendants. *Uldrich v. Gilmore*, 35 Nebr., 288; *Warrick v. Rounds*, 17 Nebr., 411.

It is urged that instruction No. 7 given by the court was prejudicial. The instruction, in so far as it is complained of, is, in substance, that the term "means of support," as used in the instructions, is not confined to the bare necessities of life, but includes all such means of support as would enable the plaintiffs to live in a "style and condition and with a degree of comfort suitable and becoming their stations in life," etc. The use of the term "style" is criticised as being a matter purely of individual taste. In *Warrick v. Rounds*, 17 Nebr., 411, it is said that "the right of support is not necessarily limited to the bare necessities of life. The condition of the family is proper to be considered by the jury." The word "style" means mode or manner. We are unable to see how the use of the word "style" in the instruction could have worked to the defendants' prejudice.

It is also urged that instruction No. 8 is prejudicial to the defendants. This instruction is as follows: "8. In determining the amount of such damages you are at liberty to consider the habits, health and estate of said Martin Kelly on and prior to April 15, 1893, the profits of his labor or occupation, the income from his property, if any, and

the condition of his said family at such time so far as such facts may appear from the evidence given in the case." An instruction in almost the identical language was approved by this court in *Jones v. Bates*, 26 Nebr., 693.

Objection is also urged to instruction No. 9. By it the court instructed the jury that in actions of this character the injured party may sue any or all the persons who have furnished the intoxicating liquors, or any part of them, which caused, or in any degree contributed to, the intoxication from which the injury resulted, and may recover, if the testimony warrants it, from any one or more of the persons who furnished such liquor, or any part of it, the whole of the damages to their means of support resulting from such intoxication. This instruction is in strict accord with the former holdings of this court. *Wardell v. McConnell*, 23 Nebr., 152; *Chmelir v. Sawyer*, 42 Nebr., 362.

From an examination of the instructions given by the court and those refused which were requested by the defendants, we are satisfied that the instructions as applied to the facts established fully and fairly stated the law as announced by the decisions of this court.

We have examined the testimony, and are clearly of the opinion that it is ample to sustain the judgment. There is no material error in the record, and we therefore recommend that the judgment be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

German Nat. Bank of Beatrice v. Atherton.

GERMAN NATIONAL BANK OF BEATRICE ET AL. V. J. S.
ATHERTON.

FILED MAY 8, 1902. No. 11,723.

Commissioner's opinion, Department No. 1.

1. **Judgment Lien: INDEX: SEARCH: METZ V. BANK.** A judgment which is valid as soon as rendered does not become a lien upon real estate, as against a subsequent purchaser without notice, until properly indexed, and a purchaser need not search for judgment liens further than to examine the proper index. *Metz v. State Bank of Brownville*, 7 Nebr., 165, followed.
2. **Admission of Fact: MISAPPREHENSION.** When an admission of fact is made by counsel upon the trial under a misapprehension, the court should, in the exercise of a wise discretion, relieve against it.
3. **Evidence.** Evidence examined, and *held* to support the finding of the court both as to diligence on the former trial and the sufficiency of the defense presented at the second one.

ERROR from the district court for Gage county. Tried below before LETTON, J. *Affirmed.*

Ernest O. Kretsinger, for plaintiffs in error.

A. H. Babcock, Samuel Rinaker and R. S. Bibb, *contra.*

DAY, C.

This is a proceeding in error from the judgment of the district court for Gage county granting a new trial at a term subsequent to the rendition of the judgment, on account of newly-discovered evidence, in an action wherein John S. Atherton is plaintiff and the German National Bank et al. are defendants. The facts necessary to an understanding of the questions presented by the record are substantially as follows: On February 11, 1893, the German National Bank recovered a judgment in the district court of Gage county against C. L. Schell for \$2,636, which judgment was duly entered upon the court journal. At that date the said Schell was the owner in fee of lots 11

and 12, in block 92 in the city of Beatrice, Gage county. On May 10, 1893, Schell and his wife conveyed the said lots by warranty deed to William H. Cramer, and on the same day Cramer and wife conveyed the premises to Emeline A. Schell. On May 15, 1895, Emeline A. Schell and husband conveyed the south sixty feet of said lots to M. A. Atherton for the named consideration of \$350, the actual consideration for the transfer being somewhat less. A short time thereafter the said premises were conveyed to R. D. Kiplinger, and by him deeded to John S. Atherton, the plaintiff. All of the above-mentioned deeds were duly recorded in the office of the register of deeds of Gage county. After acquiring the title to said premises, Atherton erected buildings thereon, and otherwise improved the property. One of the witnesses fixed the value of the improvements thus made at \$2,000. On July 16, 1898, the German National Bank caused an execution to be issued upon its judgment against Schell, and placed the same in the hands of the sheriff, who levied upon the whole of said lots 11 and 12 as the property of C. L. Schell, and was proceeding to advertise and sell the same to satisfy the execution. Before the sale was made John S. Atherton filed a petition praying for a writ of injunction against the German National Bank and the sheriff to prevent them from selling the south sixty feet of said lots to satisfy the judgment. Upon the trial of this cause the court found in favor of the defendants, and dismissed the plaintiff's cause of action. After the adjournment of the term at which this judgment was rendered, the plaintiff filed a petition for a new trial under the provisions of section 318 of the Code of Civil Procedure, alleging as a basis therefor newly-discovered evidence. Upon a hearing upon this latter motion the court vacated its former judgment and granted a new trial. To review this judgment granting a new trial, the defendants have brought the case to this court by proceedings in error.

The newly-discovered evidence which forms the basis of the plaintiff's application for a new trial, was evidence

establishing the fact that the bank's judgment against Schell was never entered upon the index record, as required by law, until April, 1894, and long after Schell had parted with the title to said lots. From this it is argued that the lien of the bank's judgment never attached to these lots. The testimony shows that the entry of this judgment in the index record had been interlined. When this was done does not appear with certainty, but that it was long after Schell had parted with his title to the lots appears beyond question. It was probably entered some time in April, 1894. The testimony also shows that Atherton was a bona-fide purchaser without notice of the bank's judgment. Under these facts it seems clear that the bank's judgment against Schell did not become a lien upon these lots so as to affect the rights of the plaintiff. In *Metz v. State Bank of Brownville*, 7 Nebr., 165, it is said that "A judgment which is valid as soon as rendered, does not become a lien upon real estate as against a subsequent purchaser, without notice, until properly indexed, and a purchaser need not search for judgment liens further than to examine the proper index." It was also held that, in addition to the general index provided for by statute, in which the names of the parties to an action, both direct and inverse, shall be entered, the judgment record must also contain the names of the judgment debtor and the judgment creditor, arranged alphabetically.

It is urged by counsel for the defendants that certain admissions made by the attorney for the plaintiff upon the first trial are binding and conclusive upon plaintiff throughout all stages of the case, and that he is precluded from denying the truthfulness of such admissions thus solemnly made. Upon the first trial counsel for plaintiff admitted, and the admission became a part of the record, that the bank recovered a judgment against Schell on February 11, 1893, for \$2,636, and that said judgment was entered of record on said day in the office of the clerk of the district court of Gage county, and properly journalized; that the date and amount of said judgment and the

amount of costs, with the judgment debtor and judgment creditor arranged in alphabetical order, were entered and indexed upon the judgment index of said court on February 11, 1893. It appears to our entire satisfaction that the admission with respect to the indexing of the judgment on February 11, 1893, was made under a misapprehension of the real facts. The index record contained no data from which it could be ascertained when the record was in fact made. True, it showed the interlineation, which was a circumstance which might well have aroused suspicion as to the time of its entry, and did prompt the attorney to make some inquiry with respect to it; but the interlineation alone was not sufficient to impeach the record. The admission was no more than a waiver of the proof which the introduction of the record would have shown. Had the record itself been introduced, and afterwards it was discovered that the entries had not been made at the time purported by it, there seems no doubt but that it could be questioned in an action for a new trial such as this is. While it is undoubtedly true, as a general proposition, that admissions of fact made by counsel in the trial of a case are binding upon the party making the admission, the rule should not be carried to the extent of prohibiting the party from withdrawing the admission if no laches appear, when it has been made under a misapprehension of the facts; and an estoppel will not arise by such admission unless others have been induced by it to alter their condition. This principle is stated in Greenleaf, Evidence [15th ed.], sec. 206, as follows: "It is only necessary here to add, that where judicial admissions have been made improvidently and by mistake, the court will, in its discretion, relieve the party from the consequences of his error, by ordering a repleader, or by discharging the case stated or the rule, or agreement, if made in court." The rule is also recognized in *Marsh v. Mitchell*, 26 N. J. Eq., 497, 501; *Holley v. Young*, 68 Me., 215; *Wallace v. Matthews*, 39 Ga., 617, 99 Am. Dec., 473.

It is also argued that the entry of this judgment upon

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the judgment index was notice to Atherton of the lien of the defendant's judgment. The fallacy of this contention lies in the fact that the title to these particular lots had passed from Schell before the lien attached. The subsequent placing of the judgment upon the judgment index could not make it a lien upon land which at that time the judgment debtor did not own.

It is next urged that there is not sufficient showing that the newly-discovered evidence might not have been produced upon the trial by the exercise of diligence on the part of plaintiff and his counsel. An examination of the record convinces us that there is not such a lack of diligence shown as would warrant the court in denying a new trial upon that ground. It is a well-settled rule that in cases of this kind the determination of the district court will rarely be interfered with. In *Smith v. Groves*, 24 Nebr., 545, it is said that "diligence, or the want of it, in discovering testimony in a particular case, depends in so great a degree upon the various circumstances concerning the parties, and the conduct of the cause, which are peculiarly within the knowledge of the trial court, that its determination on the matter of granting a new trial, made in view of them, will rarely be disturbed." In the brief of counsel for the defendants other questions are discussed, but they are bottomed upon the assumption that the admissions of the plaintiff upon the first trial are conclusive upon his rights. As we have considered this question, no useful purpose will be subserved in answering the other objections. We have gone over the testimony, and are clearly of the opinion that the plaintiff was not guilty of laches in failure to set up as a defense upon the first trial the facts now urged as a ground for a new trial.

There was no error in granting the plaintiff a new trial, and we therefore recommend that the judgment be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

GEORGE N. YOUNGSON, ADMINISTRATOR, APPELLEE, V. HARRIETT M. BOND ET AL., IMPEADED WITH OLIVE I. SPRINGER ET AL., APPELLANTS.*

FILED MAY 8, 1902. No. 10,473.

Commissioner's opinion, Department No. 1.

1. **Administrator: RIGHT TO DECEDENT'S REAL ESTATE: ACTION OF QUIA TIMET.** Under the laws of this state, the right of an administrator to the real estate of his decedent is possessory only, and such interest is not sufficient to authorize him to maintain a suit to quiet title to such real estate.
2. **Cross-Bill: AFFIRMATIVE RELIEF AGAINST CO-DEFENDANT: NO APPEARANCE: JURISDICTION.** Where a cross-bill asking affirmative relief against a co-defendant is filed out of time, and no summons is issued thereon, or served upon such co-defendant, and no appearance is made thereto, the court has no jurisdiction to try the issues tendered by such cross-bill.

APPEAL from the district court for Kearney county.
Heard below before BEALL, J. *Reversed.*

J. L. McPheely, William Gaslin and G. L. Godfrey, for appellants.

Ed L. Adams and John B. Scott (Flansburg & Williams on motion for a rehearing), contra.

KIRKPATRICK, C.

This is a suit brought in the district court for Kearney county by George N. Youngson, administrator with the will annexed of the estate of Warren Bond, deceased, against the widow and other heirs of Bond, for the purpose of reforming the will of said Bond and quieting title to certain property described in the petition filed by the ad-

*Rehearing allowed. Former judgment adhered to.

ministrator. The petition alleged that on the 24th day of October, 1896, Warren Bond died, being a resident of Whiteside county, Illinois; that he died seized, besides other lands, of the northeast quarter of section 31, township 7, range 15 west; that on September 5, 1896, he made and published his will in writing, and that by mistake of the scrivener he described the northwest quarter of section 31, instead of the northeast quarter of section 31, which he really owned, and that he had at no time owned the northwest quarter of section 31; that in making the devise, he intended to devise the northeast quarter. The petition further recited the probate of the will in Whiteside county, Illinois, and the subsequent probate in Kearney county, Nebraska, all before the mistake was discovered, and alleged that Alonzo Springer, one of the defendants, was in possession of the northeast quarter of said section, and had been in possession for about twelve years, and that said Springer claimed some interest in the premises adverse to that claimed by the administrator, and prayed a reformation of the will, and for a decree quieting title to the premises described. A copy of the will, showing the due probate in both courts, was attached and made a part of the petition. To this petition Alonzo Springer and his wife, Olive I. Springer, filed separate answers, in which they admitted the death of Warren Bond, the execution and probate of the will as alleged, and that they resided on the northeast quarter of section 31, township 7, range 15 west, in Kearney county, and alleged that they had been in the open, notorious, exclusive and continuous possession of said premises for a period of more than ten years, and denied that Warren Bond was the holder of the legal title to the land in controversy, and, in addition thereto, pleaded that on or about the 20th day of February, 1887, the defendant Alonzo Springer was the owner of the premises on which Alonzo and his wife, Olive I. Springer, now reside, and that he had a contract of purchase for the same from the Union Pacific Railroad Company; that there was a balance due on said contract of pur-

chase to the railway company for the purchase price of the land, in the sum of about \$98; that defendant Alonzo Springer was unable to pay said amount, and applied to his father-in-law, Warren Bond, for a loan of that amount of money; that Warren Bond then agreed that if Alonzo Springer and his wife would assign to him, the said Bond, the contract of purchase for said land, he would pay the remainder due to the railroad company and procure a deed for the land, and that when the amount which he had so advanced was repaid to him, with interest, he would deed the land back to defendant Springer; that said Springer and his wife accepted the offer, and duly assigned the contract; that Bond paid the railroad company the balance due of \$98, and that the deed was duly issued to him for the land; closing with a prayer that the court find that there was nothing due to the estate of Warren Bond on account of the amount advanced by him, and that any right which said estate had was barred by the statute of limitations, and that the title to the land involved be quieted in the defendant Alonzo Springer. To this answer the administrator filed a reply, which pleaded that the covenants and agreements set up in defendant's answer were within the statute of frauds, and therefore null and void, and, in addition thereto, pleaded a general denial. Trial resulted in a finding and judgment reforming the will, and quieting title to the premises in the administrator, and decreeing that the defendants, Alonzo Springer and his wife, Olive I., had no right, title, claim or interest in and to the premises which they occupied. From this finding and judgment Alonzo Springer and Olive I. Springer bring the case to this court on appeal; alleging that the district court had no jurisdiction of the subject-matter of the suit, and that the findings and decree are not supported by sufficient competent evidence. These questions, so far as necessary to a determination of the case, will be considered in their order.

The first contention of appellants is that, under the constitution and laws of this state, the district court has no

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jurisdiction of an action to reform a will, and that such action can only be brought in the county court; while upon the part of the appellees it contended that the reformation of the will in question required the aid of a court of equity, and that the county court, under the constitution and laws of the state, could have no jurisdiction. The question whether or not in any jurisdiction a will can be reformed as sought in this case,—that is, by erasing the word “north-west,” or the word “west,” and inserting in lieu thereof the word “northeast” or the word “east,”—is a grave question, and one which, in the present condition of the record in this case, we do not feel called upon to determine. The greater portion of the briefs of both appellants and appellees is devoted to a discussion of the question hereinbefore suggested, but, in our view, the disposition of the case at bar can more properly be made upon other grounds, and therefore the question of the jurisdiction of the court thus presented and argued will not be determined.

The question of the right of the administrator to bring an action such as the one at bar, while it has not been discussed to any extent in briefs on file, yet is, in our opinion, decisive of the case. The suit is brought by George N. Youngson, administrator with the will annexed of the estate of Warren Bond, deceased, and he asks to have the will reformed, and the title quieted in him, as against Alonzo Springer and wife. That portion of the will necessary to a proper understanding of the question presented reads as follows:

“Sixth: I hereby give and bequeath unto my daughter Vesta M. Springer, for and during her natural life, the use and occupancy of the east half of the northwest quarter of section 31, township 7, range 15, in Kearney county, Nebraska.

“Seventh: I hereby give and bequeath unto my daughter Olive I. Springer, for and during her natural life, the use and occupancy of the west half of the northwest quarter of section 31, township 7, range 15, in Kearney county, Nebraska, provided, however, that my said daughter Olive

I. Springer, shall pay to my grandson, George E. Bond, the sum of \$200 upon his arrival at the age of twenty-one years, and I hereby declare such sum of \$200 to be a lien upon the real estate in this seventh clause of my will described."

The land described in the paragraphs quoted is not mentioned in any other portion of the will. Olive I. Springer is the wife of Alonzo Springer, and with him resides upon, and claims an interest in, the northeast quarter of section 31. If this will should be construed to describe the northeast quarter instead of the northwest quarter of the section, the effect would be to take from the Springers eighty acres of the quarter section upon which they reside, and give it to Vesta M. Springer, a sister of Olive I. Springer, and give to Olive I. Springer a life estate only in the other eighty acres which she and her husband claim in fee. If sufficient remain in the will to support the bequest, striking out or disregarding the word "northwest" or the word "west," claimed to be erroneous, the will might be so construed by the district court, in a proper action, as to bequeath the lands claimed to have been intended by the testator. *Zirkle v. Leonard*, 60 Pac. Rep. [Kan.], 318; *Stewart v. Stewart*, 65 N. W. Rep. [Ia.], 976; *Rook v. Wilson*, 41 N. E. Rep. [Ind.], 311; *Priest v. Lackey*, 39 N. E. Rep. [Ind.], 54.

The right of the administrator to maintain this suit as one to quiet title to the premises must be sustained, if at all, under the provisions of section 57, chapter 73, Compiled Statutes, 1899, which reads as follows: "That an action may be brought and prosecuted to final decree, judgment, or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons, who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate." Under the decedents' law of this state, the right of an administrator to the lands of his decedent is posses-

sory only; and it is readily apparent from the section of the statute quoted that an administrator does not have title within the meaning of that section so as to authorize him to maintain a suit to quiet title to real estate. In the case of *Eayrs v. Nason*, 54 Nebr., 143, it is held that "a judgment dismissing an administrator's action to quiet title is not a bar to a subsequent action, by the heir against the defendant in the administrator's suit, to quiet title to the same real estate, which has descended to the heir from the administrator's intestate." And in that case the court say: "But an action of ejectment is a possessory action; and while, because of the provisions of our statute, an administrator may maintain such an action, it does not follow that he may maintain an action to quiet title to the decedent's estate by removing a cloud therefrom; and we are of opinion that an administrator, in the absence of statutory authority therefor, can not maintain such an action." *Gridley v. Watson*, 53 Ill., 186; *Shoemate v. Lockridge*, 53 Ill., 503; *LeMoynes v. Quimby*, 70 Ill., 399. Under the provisions of the statute of this state, every action, with certain exceptions not material here, must be brought in the name of the real party in interest; and, the right of an administrator to the lands of his decedent being possessory only, he has no such title as will authorize him to maintain an action to quiet title. Such action must be brought in the name of the legatee or heir, the real party in interest. It follows, therefore, that the district court had no jurisdiction of the action to quiet title, because it was not brought in the name of the real party in interest, and the judgment, therefore, can not be sustained.

In the argument of this case it was contended by appellee that, even if it should be determined that the district court had no jurisdiction of the subject-matter set out in the petition, appellants, Alonzo Springer and Olive I. Springer, who are in possession of the northeast quarter of section 31,—the land sought to be brought under the provisions of the will,—having come into court, and by way of cross-bill set up their adverse possession of the

premises for more than ten years, and having asked to have their title quieted, and the administrator having filed a reply, an issue was joined, to try which the district court had jurisdiction, and that Springer and his wife having submitted the cause to the district court upon this issue, and there being some evidence to sustain the finding of the trial court, appellants are now concluded by the judgment. In this case, the administrator, upon the filing of his petition, made the widow, Harriet M. Bond; Vesta M. Springer, Wilson Springer, her husband; Olive I. Springer, and Alonzo Springer, her husband; Alva Bond, and Mattie Bond, his wife; Edna Martin and Delos P. Martin, her husband; Isabella Wilber, and Walter A. Wilber, her husband; Loretta Reed, widow; and George Bond, a minor,—parties defendant. They were the children and legatees, with their respective husbands and wives, and the widow of Warren Bond, deceased. Personal service of summons was made upon the defendants, and they were required to answer on the 12th day of April, 1897. All of the defendants made default, except Alonzo Springer and Olive I. Springer, his wife, who filed a demurrer, which was later withdrawn, and separate answers in the case were filed by them on June 18, 1897. No summons or notice was served upon the other defendants, children and legatees of Warren Bond, of the filing of the answers and cross-petitions of Alonzo Springer and Olive I. Springer, and there was no appearance thereto by any of the defendants. All of the other defendants were necessary parties to the determination of the question presented by the cross-bill of Alonzo Springer and wife. The rule in this state has become elementary that, upon an answer and cross-bill filed out of time, a summons must be served upon the necessary parties thereto, in order to give the court jurisdiction to grant the affirmative relief sought in such cross-bill. This not having been done, the court had no jurisdiction over the parties necessary to a suit to quiet title presented by the cross-bill mentioned, and any decree that might have been entered would, as to such parties,

have been null and void. *Havemeyer v. Paul*, 45 Nebr., 373; *Patrick Land Co. v. Leavenworth*, 42 Nebr., 715.

It is contended in the briefs that, in the event Alonzo Springer and wife are not entitled to relief upon the matters set up in their cross-bill, that having pleaded the conveyance to Bond in his lifetime of the land, by an instrument in effect a mortgage, and more than ten years having elapsed since the execution of the same, they are barred of all right of redemption, and that the conveyance has become absolute. We are unable to find merit in this contention. In the case of *Pinkham v. Pinkham*, 61 Nebr., 336, this court, speaking by the present chief justice, said: "The right to commence and prosecute an action may be lost by delay, but the right to defend a suit for the possession of property is never outlawed. The limitation law may, in a possessory action, deprive a suitor of his sword, but of his shield never." From this it is clear that Alonzo Springer and his wife can not be barred from defending their right, whatever it may be, to the land in question by the statute of limitations. It therefore clearly appears that of the suit, treated as a suit to quiet title, the district court had no jurisdiction, as the administrator, not being the real party in interest, could not maintain the action. As to a determination of the question presented by the cross-bill of Alonzo Springer and wife, the court had no jurisdiction of the parties defendant necessary to a valid adjudication of the controversy.

For the reasons stated, the judgment of the trial court should be reversed and the cause dismissed.

HASTINGS and DAY, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

JASPER HUFFMAN V. WILLIAM ELLIS.

FILED MAY 8, 1902. No. 10,709.

Commissioner's opinion, Department No. 1

1. Evidence: SEPARATE ORAL AGREEMENT BY PARTIES TO WRITTEN CONTRACT: EVIDENCE. Evidence tending to establish a separate oral agreement between the parties to a written contract, as to matters upon which such contract is silent, if it does not tend to vary or contradict the terms of the written document, is admissible.
2. Instructions. Instructions examined, and *held* properly given.

ERROR from the district court for York county. Tried below before BATES, J. *Affirmed*.

George B. France and *Arthur W. Wray*, for plaintiff in error.

F. C. Power, *contra*.

KIRKPATRICK, C.

This action was brought in the district court of York county by Jasper Huffman against William Ellis. Plaintiff, in his petition, set up two causes of action. As a first cause of action, plaintiff alleged that the defendant authorized him to sell his farm in York county for \$1,000, and appointed him agent to make such sale, agreeing to pay therefor a commission of two per cent., this agreement being evidenced by a written memorandum dated August 9, 1890, and signed by defendant; that plaintiff did procure a purchaser at the price and upon the terms stated; and that defendant refused to complete the sale. As a second cause of action, it was alleged that defendant thereafter authorized and empowered plaintiff to sell the farm for \$4,500, for which he agreed to pay him a commission of two per cent.; that he found a purchaser willing and able to purchase the land at the price named; and that defendant again refused to sell. To this petition defendant filed

an amended answer in which he alleged that on the 9th day of August, 1890, he was the owner of the land described in the petition, which was encumbered by a first mortgage of \$2,000 and interest; that he was otherwise indebted to various persons, and that he was desirous of selling the land immediately, in order to relieve himself from the burden of this indebtedness; that in the year of 1890, there had been a crop failure, and that this matter was talked over with plaintiff and understood by him, and that defendant would take \$4,000 for the farm, provided the sale could be made soon; that no sale of the premises having been made in March, 1892, defendant, in order to meet his obligations, was obliged to put a larger mortgage on the farm, in the sum of \$2,500; the answer concluding with a general denial as to all other matters alleged in the first cause of action. As to the second cause of action, defendant admitted that he was the owner of the land described, and denied generally all the other allegations. A reply was filed, denying generally all new matter contained in the answer. Trial was had to a jury, which resulted in a finding and judgment for defendant, to reverse which the case is brought to this court by petition in error.

It is urged that there was error in the proceedings of the trial court in the admission of evidence and in the giving of instructions Nos. 1 and 3 given at the request of defendant in error. These objections will be considered in their order.

Plaintiff in error contends that, inasmuch as a memorandum in writing was signed by defendant in error, this constituted a contract between the parties, and that evidence admitted by the trial court regarding conversations had between the parties tending to show that there was an agreement and understanding that, if the sale was made at \$4,000, it should be made soon after the plaintiff in error was authorized to sell the land, was evidence tending to vary and contradict the terms of a written document, and was therefore inadmissible. This objection is not well

taken. The memorandum does not contain all of the agreements entered into between the parties. It is signed only by defendant in error, and does not purport to contain all of the covenants and agreements to be performed by the plaintiff in error. Moreover, it is silent as to the time within which the sale was to be made, and oral evidence tending to show the agreement of the parties as to the time within which the sale was to be made does not tend to vary or contradict the terms of the memorandum, and such evidence was admissible.

It is next contended that the court erred in giving instruction No. 1 at the request of defendant in error, which is as follows: "The jury are instructed that if an agent for the sale of real estate contracts to sell the same upon other or different terms than those which he is authorized by his principal to make, the principal would not be bound by such contract so as to make him liable to the agent for the commission in making such sale." It is urged that this instruction does not respond to the issues raised by the pleadings, and that, under the evidence, the instruction ought not to have been given. It is contended that to sustain the instruction in the language given, the answer must have pleaded that plaintiff in error procured a purchaser upon other and different terms than those authorized by his contract. We can not assent to this contention. Plaintiff in error, in order to recover, must have pleaded and proved that he was appointed agent, and that he procured a purchaser ready and willing to consummate the purchase upon the terms authorized by his principal. These allegations were contained in his petition, and were denied by the answer. This clearly presents the issue covered by the instruction. The testimony showed that in March, 1892, defendant in error, after negotiating a new loan for \$2,500, notified plaintiff in error that he would not sell the farm, after going to the great expense of negotiating a new loan, for less than \$2,000 above the \$2,500 mortgage. The testimony further shows that in the fall of 1892, plaintiff in error procured a purchaser who

was willing to purchase the farm for \$4,000, which was \$500 less than the price at which he was authorized to sell. Again, late in the fall, the testimony tends to show that he procured a purchaser who was willing to purchase the place for \$4,500, subject to the \$2,500 mortgage, drawing interest at the rate of six per cent. per annum. In the spring of 1892 defendant in error made the new loan. He gave a mortgage for \$2,500, drawing interest at six per cent., and gave a second or interest mortgage for \$250; being two per cent. interest for the five years the loan was to run. The record clearly shows that defendant in error understood that he was to have \$2,000 for the farm, above this \$2,500 mortgage. The second purchaser whom plaintiff claims to have procured was only willing to pay \$1,750 in cash for the place, which would be a deduction from the price at which defendant in error agreed to sell of the \$250 interest mortgage, representing the interest not due, but accruing during the next five years. It is quite clear that plaintiff in error was not authorized to make either of the sales which he attempted to make upon the terms at which he procured the purchasers. It is therefore quite clear that the first instruction complained of was correctly given, under the issues made by the pleadings and the evidence in the case.

Instruction No. 3, regarding which complaint is made, is as follows: "The jury are instructed that when the owner of property employs another as agent to sell same without agreeing upon any time for which the agency is to continue, either party may determine the agency at any time by giving notice of his intention so to do, and if you find in this case that the defendant did so notify the plaintiff not to sell the property in question before the plaintiff entered upon negotiations with the alleged purchaser Hoyt, then you should find for the defendant upon the second cause of action." The objection made to this instruction is the same as that made to instruction No. 1; that is, that the instruction was not properly given in view of the fact that the answer filed by defendant in

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error as to the second cause of action was a general denial. As we have seen, this objection can not be sustained. Again, instruction No. 7 given by the court upon its own motion, is in all respects substantially like the instruction complained of, and to the giving of such instruction plaintiff in error saved no exceptions. There seems to be no doubt that under the issues raised by the pleadings, and the evidence introduced, the instructions correctly stated the law. There is no complaint that the verdict is not sustained by the evidence.

It is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and DAY, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

JAMES D. SWANEY V. COUNTY OF GAGE.

FILED MAY 8, 1902. No. 11,748.

Commissioner's opinion, Department No. 2.

Highways: DEFECTIVE BRIDGE: INJURY: LIABILITY: LIMITATION.

Section 117 of chapter 78 of the Compiled Statutes, entitled "Roads," which authorizes the prosecution of suits for damages to the person and property of one injured by reason of a defective bridge or public road, is an act of the legislature complete in itself, and the limitation of time for the commencement of actions contained therein applies to all persons, without regard to any kind of disability whatever. A suit based on that act which is commenced more than thirty days after the injuries complained of occurred, can not be maintained.

ERROR from the district court for Gage county. Tried below before LETTON, J. *Affirmed.*

F. B. Sheldon and Ernest O. Kretsinger, for plaintiff in error.

H. E. Sackett and H. E. Spafford, contra.

BARNES, C.

This action was commenced in the district court of Gage county by the plaintiff in error to recover damages of the defendant on account of injuries to his person and property alleged to have been sustained by the falling of a bridge on a public highway in the defendant county, which plaintiff was crossing at the time. The petition was sufficient in form and substance to state a cause of action, had it not shown upon its face that the suit was not commenced for more than thirty days after the injuries were sustained. It was alleged that the plaintiff was injured on the 6th day of November, 1899, and the action was not commenced until the 28th day of December, following, fifty-two days after the cause of action accrued. In order to avoid the effect of the statute requiring the action to be commenced within thirty days after the time of the injury, plaintiff alleged that he was so badly injured that he became insane, and confined to his bed, and was physically disabled, and was legally *non compos mentis* during all of the time from the 6th day of November, 1899, until the following 20th day of December, and that he commenced the action within thirty days after recovering from the disability which prevented him from prosecuting the same. To this petition the defendant filed a demurrer, which properly raised the question of limitation, and this demurrer was sustained. To this ruling of the court the plaintiff excepted, elected to stand upon his petition, and refused to further plead. Thereupon the court dismissed the action, and the plaintiff prosecuted error to this court.

1. But one question is presented for our consideration, which is: Do the facts stated in the petition toll the limitation provided for in the act under which this action is prosecuted, and allow it to be commenced and maintained at a time subsequent to the expiration of thirty days after the time when the injury occurred? This action is based on section 117 of chapter 78 of the Compiled Statutes,

entitled "Roads." It was passed by the legislature of 1889, and took effect July 1, 1889, and is as follows: "If special damage happens to any person, his team, carriage, or other property by means of insufficiency, or want of repairs of a highway or bridge, which the county or counties are liable to keep in repair, the person sustaining the damage may recover in a case against the county, and if damages accrue in consequence of the insufficiency or want of repair of a road or bridge, erected and maintained by two or more counties, the action can be brought against all of the counties liable for the repairs of the same, and damages and costs shall be paid by the counties in proportion as they are liable for the repairs; *Provided, however,* That such action is commenced within thirty (30) days of the time of said injury or damage occurring." This act, which alone creates the plaintiff's right of action, limits the time within which such action could be commenced, and contains no saving clause exempting any class of persons whatever from its operations. The plaintiff, however, contends that the provisions of section 17 of the Code of Civil Procedure apply to this case, and that this action was properly commenced within thirty days after the plaintiff's alleged disability ceased to exist. Section 17 of the Code must be held to have been adopted in contemplation of and with reference to liabilities and causes of action known and existing under the laws of this state at the time of its adoption, and which are classified under the several subdivisions of the chapter in which this section is found. This kind of an action was not known or recognized and could not be maintained, under the laws of this state at that time. The right to maintain such an action was not given until the legislative session of 1889. To hold that section 17, which provides that "if a person entitled to bring any action mentioned in this title * * * be, at the time the cause of action accrued, within the age of twenty-one years, a married woman, insane, or imprisoned, every such person shall be entitled to bring such action within the respective times limited by this title

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after such disability shall be removed," applies to this case, and that by reason thereof plaintiff could bring this action at any time within thirty days after the 20th of December, 1899, would, by judicial legislation, import that section into the act of 1889. The court will not thus usurp legislative functions.

The plaintiff, in a very able and ingenious argument, contends that the thirty-day limitation in this case did not commence to run until December 20, 1899, because there was no person in existence qualified to institute the action until that time; that, independent of authority, it must be considered that the cause of action did not exist until there was a person in existence capable of suing; and that the object of the statute is manifest, and its purpose is to limit the time of commencing a suit to a person *in esse* capable of suing. We can not agree with this contention. The cause of action in this case arose at the time of the injury complained of. The plaintiff in this case, although injured, and for the time being under disability, was living. He was *in esse*, and it is conceded that this action could have been commenced by his next friend or by a guardian. If this be true, then the hardship complained of exists largely in the imagination of the plaintiff and his counsel. In the case of *Morgan v. City of Des Moines*, 60 Fed. Rep., 208, Judge Caldwell, speaking for the court, made use of the following language: "The ground upon which saving clauses in statutes of limitation in favor of infants and married women are upheld is the injustice of barring the cause of action of one who is technically incapable of suing. Theoretically, this reason is extremely persuasive; but, speaking for myself, I give it as my deliberate judgment, after forty years' experience at the bar and on the bench, that the saving clauses in statutes of limitation, exempting infants and married women from their operation, have been productive of more hardships and injustice than would have resulted from the absence of such provisions. An examination of the reports will disclose the fact that the most flagrantly unjust and in-

equitable judgments and decrees that courts have been compelled to render resulted from these saving clauses. Technically, an infant can not maintain a suit, and in contemplation of law, is ignorant of his rights; but, in fact and in practice, infants, through their guardians and next friends, are commonly the most diligent and persistent of suitors, and the instances are few where any meritorious right is allowed to slumber." This would seem to be a complete answer to the argument of the counsel based upon the question of the hardship accruing by reason of a strict enforcement of the thirty-day limitation provided for by the statute in this case.

Plaintiff contends that defendant's own wrongful acts delayed him in commencing the action, and cites us to *Woodmen Accident Ass'n v. Pratt*, 62 Nebr., 673, and a line of cases which hold that, where the party against whom the action is brought has by his own conduct delayed the commencement of the suit until after the time fixed therefor in the contract has expired, he can not avail himself of the delay as a bar to the prosecution of the action. In the cases cited the delay was invariably caused by some act or conduct of the party sued which took place after the cause of action had accrued, and which delayed the commencement of the suit. In the case at bar no independent act of the defendant, occurring subsequent to the time of the accident, which delayed the bringing of the action, is pleaded. These authorities, therefore, are not in point, and are of no assistance to us in solving the question under consideration. In the case of *Bryant v. Dakota County*, 53 Nebr., 755, this court held that the statute in question was valid. In that case an action was brought to recover damages sustained by the dangerous condition of a highway. The suit was not commenced until more than thirty days had elapsed after the injury occurred. A demurrer to the petition was sustained in the lower court, and this court, in passing upon the question, affirmed the judgment, and held that the statute, including the limitation, was constitutional; that it was a complete act in

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itself, and in no manner conflicted with any other provisions of the statute. It must be conceded that the legislative body, which created the right of action, had absolute power to determine the conditions under which it must be brought, including the limitation as to time. This kind of a cause of action was not known to our law until it was provided for by the legislature of 1889. Without such a law the plaintiff in this case would have had no right of action at all, and it can not be successfully urged that the act which gave him the right to sue and which also limited the time in which he must commence his action, deprived him of any right, or in any manner worked a hardship upon him; and if it has that effect it is a proper matter to be addressed to the discretion of the legislature, for without further action by that body the court can give him no assistance. As we have heretofore said, this was new and independent legislation, and the act was complete in itself. It established the rule for the class of cases to which it relates. The power of the legislature to enact the statute can not now be questioned, for that matter was determined by *Bryant v. Dakota County, supra*. It would be entirely competent for the legislature to enact a general statute of limitations putting minors, adults, insane persons and all others on the same footing as to all causes of action; and such would be the legal effect of a statute which contained no saving clause excepting such persons from its operation. This principle has never been questioned. It follows that, there being no saving clause exempting any class of persons from the limitations in the statute in question, the plaintiff's cause of action was barred, and no suit could be commenced thereon on and after the 7th day of December, 1899. *Morgan v. City of Des Moines*, 60 Fed. Rep., 208; *Vance v. Vance*, 108 U. S., 514, 521; *Blivens v. City of Sioux City*, 52 N. W. Rep. [Ia.], 246; *Bryant v. Dakota County, supra*; *Springer v. City of Detroit*, 60 N. W. Rep. [Mich.], 688; *Davidson v. City of Muskegon*, 69 N. W. Rep. [Mich.], 670.

It must have been the intention of the legislature, in

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thus limiting the time for the commencement of actions under the section on which this suit is based, to require such suits to be prosecuted while the incidents were still fresh in the minds of every one connected therewith. It would then be easy to investigate the matter, and the trial would take place before the witnesses to the transaction would become scattered and their testimony thus be made hard to obtain. The provision thus safeguarding the rights of the public against the prosecution of speculative actions and cases of doubtful merit based upon this statute was a wise and provident one. There is no reason why the courts should not uphold it, both in its letter and its spirit.

It follows that the demurrer to the petition in this case was properly sustained. We therefore recommend that the judgment of the district court be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

HERBERT F. HALL ET AL. V. BYRON B. HOPPER.

FILED MAY 8, 1902. No. 11,320.

Commissioner's opinion, Department No. 2.

1. **Principal and Agent: REPUDIATION OF PART OF UNAUTHORIZED CONTRACT.** A principal can not accept the part of an unauthorized contract entered into by his agent which is beneficial to him, and repudiate the part which is to his detriment. He must either ratify the whole contract or repudiate it entirely.
2. **Suit on Contract of Agent: LIMITATION OF AUTHORITY: KNOWLEDGE OF DEFENDANT.** Where a plaintiff sues on a contract entered into through an agent who apparently acted with general authority, he will not be permitted to show a limitation of the authority of his agent in making such a contract, unless he proves that such limitation was known to exist by the defendant at the time he contract was entered into.

ERROR from the district court for Douglas county. Tried below before POWELL, J. *Affirmed.*

Richard S. Horton, for plaintiffs in error.

Baldrige & De Bord, contra.

OLDHAM, C.

This was an action for damages for a breach of a contract for the sale of 25,000 bushels of corn. The petition alleges, in substance, that the plaintiffs purchased 25,000 bushels of corn from the defendant on what is known among dealers as "Baltimore terms," for which they agreed to pay twenty cents per bushel if the corn "graded mixed." The petition alleges that under this contract the defendant delivered to them 21,500 bushels of corn and that they had advanced to him the sum of \$2,151.25 on said contract of purchase before the corn was received. The petition then sets out at length what is meant by "Baltimore terms," and alleges that under these terms they have overpaid the defendant the sum of \$1,132.93 for the corn received. There was a second count in the petition, asking for damages for defendant's refusal to deliver the remaining 3,500 bushels of corn contracted for. Defendant answered this petition, admitting that he had contracted to sell to plaintiffs 25,000 bushels of corn, but denied that said contract provided that the corn was to be sold on "Baltimore terms"; but alleged, on the contrary, that he was to receive twenty cents per bushel for all the corn sold plaintiffs which "graded mixed," and nineteen cents per bushel for all the remainder of the corn which he sold plaintiffs. He admitted that plaintiffs had advanced him the sum of money stated in their petition, and he alleged that he had delivered 21,721 bushels of corn to plaintiffs on this contract. He further alleged that under the contract entered into there was still due him the sum of \$257.53. He further alleged that he refused to deliver the remainder of the corn contracted for because of plaintiffs' refusal to pay the price agreed upon for the corn delivered. To this answer plaintiffs filed a general denial. On issues thus

joined there was a trial to a jury, verdict for defendant, and judgment was entered on the verdict, and plaintiffs bring error to this court.

It developed in the trial of this cause that the contract for the purchase of this grain was entered into by the plaintiffs through the agency of Harry C. Miller, a grain broker doing business in the city of Omaha, Nebraska. No reference, however is made to the agency of Miller, either in the petition, answer or reply. The contract was a verbal one, entered into and discussed mainly over the long-distance telephone between Waterloo, Nebraska, and Omaha, and the testimony is sharply conflicting as to what the terms of the contract were; Miller claiming the contract to be as set forth in plaintiffs' petition and the defendant claiming it to be as alleged in his answer. In the trial of the case plaintiffs sought to show that Miller's agency was a limited one, and that he had no authority to contract for the purchase of grain for the plaintiffs on other than "Baltimore terms." The entire controversy depended on the terms of the contract, and on nothing else. Plaintiffs requested three instructions submitting to the jury the question of Miller's limited agency to contract for plaintiffs. These instructions were all refused. The jury was instructed only on the issues as set forth in the pleadings. The only action of the trial court for which we are asked to reverse this judgment is its refusal to submit to the jury the question of Miller's limited agency in making this contract. Plaintiffs admit that, if Miller had the authority to make such a contract as defendant alleges, then, under the conflict of testimony as to what the contract was, we would not be justified in disturbing the verdict of the jury; but he contends that it was reversible error for the court to refuse to submit this issue to the jury.

With this contention we can not agree. Plaintiffs seek to avail themselves of the beneficial part of the contract entered into by their agent, and if they desire to accept any part of this contract they must accept it as a whole. It is elemental that a principal can not ratify the part of an

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unauthorized contract made by his agent which is advantageous to him and repudiate the part which is to his detriment. Miller was apparently acting with general authority to purchase grain for plaintiffs, and no limitation of this authority would bind the defendant unless the evidence clearly showed that this alleged limitation of authority was known to the defendant at the time he contracted with Miller. This the evidence fails to show.

It is therefore recommended that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

**CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY V.
JOHN P. SATTLE, ADMINISTRATOR.**

FILED MAY 8, 1902. No. 11,549.

Commissioner's opinion, Department No. 3.

1. **Passenger on Train: LEAVING CAR BEFORE ARRIVING AT TERMINUS.** A passenger on a railroad train does not lose his character as such by leaving his car at a regular station from motives of either business or curiosity, although he has not yet arrived at the terminus of his journey.
2. ———: ———: **SWITCH: ASSUMPTION OF RISK.** Where, however, the train in which the passenger is being transported is run upon a switch to allow the passage of another train, or is stopped at a place other than that used by the carrier for receiving and discharging passengers, and the stoppage is not for the purpose of allowing passengers to board the train or alight therefrom, one who leaves the train must usually assume all the ordinary risks incident to his action.
3. ———: **DEFINITION: CONSTRUCTION OF STATUTE.** All passengers actually on the train, whether the same is moving or not, are passengers "being transported over its road" within the meaning of section 3, chapter 72, of the Compiled Statutes; and passengers who have left the train at the express or implied invitation of the carrier, for any necessary purpose incident

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to their journey, are passengers being transported within the meaning of said section.

4. ———: **LEAVING CAR: PROTECTION.** Where a passenger leaves his car of his own volition, for some purpose of his own not incident to the journey he is pursuing, and at a place not designed for the discharge of passengers, he can not claim the protection of section 3, chapter 72 of the Compiled Statutes, although the carrier may, under some exceptional circumstances, still owe him the duty imposed on it by the common law.
5. **Facts Set Out: CONCLUSION.** A through train between Denver and Chicago ran onto a side track at an intermediate station to allow the passage of another through train from the east. A through passenger left his car, crossed the main track of the road to the depot, and went to a pump for a drink of water. He filled his cup from the pump, but, before drinking, heard the whistle of the incoming train, and started on a rapid run to regain his car. From the pump the track over which the incoming train was approaching could be seen for about one hundred feet, and three steps from the pump toward the track over which the train was approaching the track was visible for a mile or more. When the passenger reached the track the approaching train was about fifty feet distant from him, and running at a high rate of speed. The passenger attempted to pass in front of the train, and was struck by the engine and killed. *Held* that, under the circumstances, he was not "a passenger being transported over the road," within the meaning of section 3, chapter 72 of the Compiled Statutes, and the railroad was not liable for damages on account of his death because of his own negligence.

ERROR from the district court for Cass county. Tried below before JESSEN, J. *Reversed.*

M. A. Low, William F. Evans and Woolworth & McHugh, for plaintiff in error.

Matthew Gering, *contra.*

DUFFIE, C.

John P. Sattler, the defendant in error, is administrator of the estate of Emanuel Leveroni. The deceased was killed by a train of the railroad company at the station of Alvo, in Cass county, Nebraska, on the 11th of April, 1899. The jury returned a verdict against the company for \$4,000, upon which judgment was entered, and the com-

pany has brought the case to this court by petition in error.

There is little or no dispute over the facts in the case. Leveroni, the deceased, was a through passenger over the railway of the plaintiff in error from the city of Denver to Chicago. The train upon which he was traveling arrived at the station of Alvo from the west on schedule time at 2:52 in the afternoon. On its arrival at the station the train went upon a side track to await the arrival and passage of a west-bound train which was then due at that point; its schedule time being the same at that station as the train upon which the decedent was traveling. The train from the east was behind time, and, while the train upon which Leveroni was a passenger was waiting on the side track, Leveroni left his train, crossed over the main track to the depot platform and to a pump a few feet west of the depot, to get a drink of water. About the time that he reached the pump the west-bound train was heard to whistle, when Leveroni left the pump and started on a run for his car, and in crossing the track upon which the west-bound train was approaching the station, was struck by the approaching train and instantly killed. The east-bound train upon which he was a traveler did not move from the side track until after the deceased was killed, nor had any signal or order been given that said train would move or start. It might be further stated that the evidence is undisputed that there was plenty of good drinking water in the car upon which the deceased was a passenger, and in all the cars of that train.

Two questions are presented by this record for our determination: (1.) Was the deceased a passenger, within the legal meaning of that word, after leaving his car while it was standing upon the side track for the purpose of allowing an approaching train to pass? (2.) If he was such passenger can his administrator claim for him or his estate the benefits of the provisions of section 3 of chapter 72 of the Compiled Statutes of 1901?

Relating to the first question, the courts may be said

to be fairly divided. In Maine and Minnesota the rule appears to be that a passenger on a railway, who purchases a ticket for a distant station, and gets off the train temporarily, and without objection or notice, while it is stopping at an intermediate station, surrenders for the time being his place and rights as a passenger. *State v. Grand Trunk R. Co.*, 58 Me., 176; *De Kay v. Chicago, M. & St. P. R. Co.*, 41 Minn., 178. See, also, *Missouri P. R. Co. v. Foreman*, 73 Tex., 311. In *De Kay v. Railway Co.* the facts were very similar to the facts under consideration in the case at bar. The conclusion of the court upon these facts is well expressed in the syllabus of the case as follows: "Where a passenger enters a railway train and pays his fare to a particular place, his contract does not obligate the company to furnish him with means of egress and ingress at an intermediate station; and if he leaves the train at such a station, he for the time being surrenders his place as a passenger, and takes upon himself the responsibility of his own movements. But if he leaves without objection on part of the company, he does no illegal act, and has a right to re-enter and resume his journey. While, if a railway company permits the practice of passengers leaving and re-entering their train, while on a side track at an intermediate station for the purpose of letting another train pass on the main track, it is bound to use reasonable care not to expose such passengers to unnecessary danger, yet it is not bound to so regulate its business as to make the side track as safe a place of ingress or egress as the station platform; nor does it give any assurance, under such circumstances, to passengers that no trains will pass while they are crossing or recrossing the main track. Neither does the call of 'all aboard!' by the conductor of the side-tracked train, give an assurance to those who have left their train that they may cross the main track in safety without looking for approaching trains. Passengers who have thus left their train, when they attempt to cross the track under these circumstances, are bound to exercise reasonable care

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and caution to avoid injury from passing trains, and must use their senses for that purpose. The station platform and not the side track is the proper place to enter or leave a train; and those who, for purposes of their own, use the latter, assume all the extra risks necessarily incident to such a practice, and are bound to exercise a degree of care corresponding to the increased risks." Another class of cases establish the rule that a passenger on a railroad train does not lose his character as such by alighting from the cars at a regular station from motives of either business or curiosity, although he has not yet arrived at the terminus of his journey. *Parsons v. New York C. & H. R. R. Co.*, 113 N. Y., 355; *Clussman v. Long Island R. Co.*, 9 Hun [N. Y.], 618.

Of the two classes of cases which we have been examining, we think that the latter establishes the better rule. In this country of long journeys by railway trains, there can be no impropriety in a passenger claiming the right, which may be said to be established by long custom, to leave his car at any intermediate point on his journey, where a stop of any considerable time is made, to send a message, to obtain exercise and relief by walking up and down the platform, or to gratify his curiosity, provided he does not interfere with the employees of the company. or run counter to any established rule brought to his notice. In the exercise of this privilege he does not lose his character of passenger, and the common-law duties of the carrier are still to be exercised in his behalf, and injuries received on account of a failure on the part of the carrier to observe all its duties toward him required by the rules of the common law must be responded to in an action for damages. We think that the supreme court of Massachusetts has announced the true rule in *Dodge v. Boston & Bangor Steamship Co.*, 148 Mass., 207, where the following language is used: "To determine the rights of the parties in every case, the question to be answered is, what shall they be deemed to have contemplated by their contract? The passenger, without losing his rights while he

is in those places to which the carrier's care should extend, may do whatever is naturally and ordinarily incidental to his passage. If there are telegraph offices at stations along a railroad, and the carrier furnishes in its cars blanks upon which to write telegraphic messages, and stops its trains at stations long enough to enable passengers conveniently to send such messages, a purchaser of a ticket over the railroad has a right to suppose that his contract permits him to leave his car at a station for the purpose of sending a telegraphic message; and he has the rights of a passenger while alighting from the train for that purpose, and while getting upon it to resume his journey. So of one who leaves a train to obtain refreshment, where it is reasonable and proper for him so to do, and is consistent with the safe continuance of his journey in a usual way. Where one engages transportation for himself by a conveyance which stops from time to time along his route, it may well be implied, in the absence of anything to the contrary, that he has permission to alight for his own convenience at any regular stopping-place for passengers, so long as he properly regards all the carrier's rules and regulations, and provided that his doing so does not interfere with the carrier in the performance of his duties."

All the cases agree that the carrier must furnish safe ingress and egress to and from the train for its passengers. In many of the larger stations the passenger has to cross two or three or four tracks in going to or from his train. In such cases he may assume that the company will see that his way across such tracks is clear and uninterrupted, and that no injury will be incurred in crossing the same. In *Jewett v. Klein*, 27 N. J. Eq., 550, it is held that a person who, in passing from the depot to the train he was about to take, was obliged to cross an intervening track, was not guilty of contributory negligence in that he did not, before approaching the train, look up or down the track to see whether there was danger from an approaching train, and in that he approached the train diagonally

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from the platform of the station, and before his train had come to a full stop. Referring to this case, the supreme court of Colorado, in *Atchison, T. & S. F. R. Co. v. Shean*, 33 Pac. Rep., 108, says: "By the foregoing and other well-considered cases, it is settled that a passenger on a railroad, while passing from the cars to the depot, is not required to exercise that degree of care in crossing the railroad track as is imposed upon other persons, and that he has the right to assume that the company will discharge its duty in making the way safe; and, relying on this assumption, may neglect precautions that are ordinarily imposed upon a person not holding that relation. And this distinction is to be taken into consideration in determining the propriety of his conduct."

We do not care to extend this rule to passengers who leave the train at an intermediate station at a place other than that used by the carrier for the ingress and egress of its passengers. One who leaves the train at a point not intended for the discharge of passengers, and while the train is standing for some other purpose, must himself assume all the ordinary risks incident to his action. The cases above cited differ from the case at bar in the fact that the passenger left or boarded the train at its regular stopping place, and at the point where passengers were regularly received and discharged.

In the case now under consideration no stop was made to receive or discharge passengers. The train was not run to the depot platform but was side-tracked to allow the passage of the west-bound train. It is probably true that parties who desired either to board or leave the train at Alvo, and who were aware of the custom of the train to side-track at that point to allow the west-bound train to pass, took advantage of the opportunity thus offered to take passage on the train, or to leave it while standing on the side track; but no inducement to do this was extended by the company, as the evidence discloses that it refused to sell tickets to passengers who desired to take this train at that station. Those on the train must have

known that the stop upon the side track was not for the purpose of receiving or discharging passengers, and those who left the train without any express or implied invitation so to do on the part of the company and without some known reason requiring them to do so, should in all reason, assume the natural and ordinary risks of their own voluntary action. A part of the fourth instruction of the court expresses so clearly our views upon this question that we insert it here: "If you find from the evidence that when the said Emanuel Leveroni left his car while standing on the side track at Alvo, Nebraska, he did so without the invitation of the defendant, either express or implied, and not for the purpose of attending to any personal want of his own, usually incident to a through passenger, nor made necessary by the manner in which the defendant's train was operated, then it was his duty while absent from said train, to exercise ordinary care to avoid any injury to himself, and if you find from the evidence that while so absent from his car he failed to exercise ordinary care, and was injured through his failure so to do, then the defendant would not be liable."

Having now defined what we believe to be the rights of a passenger at common law, we will proceed to examine our statute relating to injuries received by passengers while being transported over a railway, and the questions discussed in the briefs of counsel in the light of that statute.

Section 3 of chapter 72 of our Compiled Statutes is as follows: "Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." In *Chicago, B. & Q. R. Co. v. Landauer*, 39 Nebr., 803, it was held that this statute made a common carrier an insurer of the safety of its passengers, except as against the gross

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negligence of the passenger, or his violation of some rule of the carrier brought to his notice; but up to this time this court has not been called on to determine the particular persons or class of persons taking passage with a railroad company, who were intended by the legislature to be included in the phrase "passengers being transported over its road." The plaintiff in error insists that the statute was not intended to cover all cases of injuries to passengers, and its position on this question can not be more clearly or briefly stated than by quoting from its reply brief:

"Although no one but passengers can be brought within the section, yet it is not designed to cover injuries to all passengers. By express provision, as clear and positive as language will permit, the section carved out of the general body of passengers of a company, the particular class thereof to which it applies. 'Every railroad shall be liable for all damages inflicted upon the person of passengers' (so reads the section) 'while being transported over its road.' The liability imposed by this section, with respect to injuries to passengers, extends only to those injuries which passengers receive while such passengers 'are being transported over its road.' The clause 'while being transported over its road' is a clear limitation modifying the general word 'passengers' in the section. Therefore, to bring a case within this section, it must be shown that when the injury was received by a person he was not only a passenger, but that at the time of the injury he was, as such passenger, 'being transported over the line of the railroad company.' There is, of course, a manifest reason for this qualifying clause. The purpose of the act was to relieve the passenger injured 'while being transported over the line of the company' from the necessity of specifically proving the act of negligence which caused the injury. The passenger who buys a ticket and takes his seat upon the train, may know that the court will presume that any injury which he receives on account of the operation or management of the train, will be presumed

to be attributable to negligence on the part of the railroad company. The train and all agencies connected with its management belong to the railroad company. All knowledge with respect to the cause of injuries resulting from the operation or management of the train is known to the company, but these causes may be difficult for an injured person to ascertain. The section was designed to relieve the passenger, so injured, from the necessity of proving the specific act of negligence. This manifest reason for the adoption of this section shows the purpose of the insertion of its provision 'while being transported over its road.' After a person leaves the train provided for his transportation, then whatever dangers he encounters are dangers not connected with the operation and management of his train; and if he is injured he must prove negligence, and recover, if at all, upon the common-law liability. While riding upon the train provided for his transportation, he may not be able to learn the cause of an injury so received, due to the operation and management of the train. Therefore, as was said, this section was provided to relieve him of the necessity of proving such acts. But when the passenger leaves the train provided for his transportation, and is injured by reason of dangers entirely disconnected from the operation and management of his train, then there will be no difficulty in his ascertaining the cause of his injury, and in alleging and proving it in case of suit. Therefore the legislature did not intend that the presumption of negligence provided by the section should apply to such a case; and, to make the meaning clear, the legislature expressly made the section apply not to injuries to all passengers, but to injuries received by passengers 'while being transported over the road of the company.' The legislature having expressly limited the operation of the statute to the cases of injury received by passengers 'while being transported over the road of a company,' this court can not obliterate the qualifying clause referred to. This court, in construing this statute, must give effect to every provision thereof.

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When the legislature expressly limited this section to cases of liability for injuries to those passengers only who were injured 'while being transported over the road of a company,' this court has no power or authority, nor will it have any inclination to nullify the express will of the legislature and to extend this section to cases which the legislature expressly excluded from its effect."

We are agreed that the words "while being transported over its road" is a qualifying phrase, intended to limit liability on the part of the company, and that we must give it the force intended by the legislature. We can not, however, agree with plaintiff in error that it was intended to exclude all passengers who leave the car provided for them by the carrier. It is well known that many—perhaps most—roads provide eating houses and other accommodations for the comfort or convenience of their patrons. and that regular stops are made for meals, requiring the passengers to leave the car in which they are being transported, and often to cross numerous tracks on their way to and from the car to the dining room or restaurant. In such cases one does not lose his character as a passenger in the course of transportation over the road, or the protection of the statute. The duty of the company to provide him safe egress and ingress for such necessities as are required on his journey, and which the road assumes to furnish, and which it invites him to partake of, is no less stringent than to furnish him safe passage on its cars. While seated in the dining room of the company he is under its control, and must conform to its rules, as fully as while on the train; and while thus subject to the rules and regulations of the company, he is their passenger, entitled to like protection from damage from the operating of the road as while seated in the car, proceeding on his journey. We believe and hold that it was intended to include in the words "while being transported over its road" all passengers actually on the train, whether the same is in motion or standing on any part of the road: and it further includes those passengers leaving the train

for any necessary purpose incident to their journey, such as a change of cars, or to procure refreshments at any point where the same are furnished by the company, and where an express or implied invitation is extended to the passengers to leave the car for that purpose. Where, however, the passenger leaves the car for some purpose of his own, not incident to the journey he is pursuing, and at a place not designed for the discharge of passengers, he can not claim the benefit of this statute, although the company may in such cases, under certain conditions, owe him the duty imposed on carriers by the common law. *Parsons v. New York C. & H. R. R. Co.*, 113 N. Y., 355; *Gulf, C. & S. F. R. Co. v. Morgan*, 64 S. W. Rep. [Tex. Civ. App.], 688. The only evidence offered by the company was that of one witness to show that there was plenty of good drinking water in the car in which the deceased was being carried. All of the testimony relating to the circumstances attending the killing of Leveroni came from the witnesses of the plaintiff below. These witnesses all testify that they distinctly heard the whistle of the train approaching from the east. Most of them testify that they saw Leveroni at the pump. One, a Mrs. Brown, a passenger sitting in the car, says that she saw him ascending the steps of the depot platform with a cup in his hand. All who saw him at the pump say that he filled his cup, but that, before he had time to drink, the whistle of the approaching train was heard; that Leveroni thereupon dropped the cup, and ran in a rapid manner for his train. Mrs. Brown relates what occurred as follows: "He went from the steps to the pump, and pumped water into a tin cup which he had. He dropped it. The whistle blew. That is the first warning he had, I am confident." He left the train of his own volition while standing on the side track, and for a wholly unnecessary purpose. In so doing he abandoned the protection of the statute. The witnesses agree that from the pump the railway track can be seen for the distance of one hundred feet toward the northeast, from which direction the train was approach-

ing. By taking three steps from the pump toward the main line of the road, the view is unobstructed for a mile or more, and the approaching train could have been seen for that distance. When Leveroni reached the track, running rapidly to reach his car, the train was about fifty feet away, and running at a high rate of speed. The evidence is convincing that Leveroni heard the whistle of the approaching train. It was that which caused him to drop his cup, and to run hurriedly to reach his car. He attempted to cross the track in a diagonal course, running partly in the same direction with the approaching train. This, however, is no reason why he should not turn his head to ascertain the position of the train, and whether it was safe to attempt to cross ahead of it. As we have seen, Leveroni was not, under the circumstances, "a passenger being transported over the road," within the meaning of the above quoted statute. His case must therefore be determined by the rules of the common law, in accordance with which he must be held to suffer the consequences of his own carelessness and negligence. With full knowledge, or full opportunity for knowing the danger, he left a place of safety on the platform of the depot and ran to his death.

We know of no rule of law that allows a recovery under such circumstances, and we recommend that the judgment of the district court be reversed and the case remanded for further proceedings according to law.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the case remanded for further proceedings according to law.

REVERSED AND REMANDED.

MARY FERGUSON ET AL. V. JACOB HERR ET AL.*

FILED MAY 8, 1902. No. 11,638.

Commissioner's opinion, Department No. 3.

Adoption of Children: INHERITANCE. Section 797 of title 25, chapter 57 of the General Statutes of 1873, relating to the adoption of children, provides, in effect, that the parents, guardian or person having the minor in charge, should file with the probate judge a signed and sworn statement relinquishing all right to the custody and control of the child, and all claims for services and wages. The person adopting was required to file a similar statement that he freely and voluntarily adopted the child as his own "with such limitations and conditions as shall be agreed upon by the parties," and then, as a proviso, was added this language: "Provided, whenever it shall be desirable, the party or parties adopting such child may, by stipulations to that effect in such statement, adopt such child and bestow upon him or her equal rights, privileges, and immunities of children born in lawful wedlock." *Held*, That a child adopted under said section would not inherit from the adopting parents in the absence of an affirmative statement to that effect in the statement made and filed by them with the county judge, or the use of language which clearly indicated the intention of the foster parents that the child should inherit.

ERROR from the district court for Richardson county.
Tried below before LETTON, J. *Affirmed*.

Francis Martin, Edwin Falloon and Clarence Gillespie (Jefferson H. Broady, on motion for rehearing), for plaintiffs in error.

Reavis & Reavis, contra.

DUFFIE, C.

February 26, 1870, Benjamin F. Ferguson and Hannah Ferguson, his wife, by proceedings instituted before the county judge of Richardson county, adopted Willie Duff Martin, who was at that time two and one-half years of age, and in custody of the poor master of Otoe county, Nebraska. Hannah Ferguson was the owner of certain real estate in Richardson county, and died intestate in the year

*Rehearing allowed. See opinion on page 659, *post*.

1888. At the time of her death Willie Duff Martin, who had lived with the Fergusons as their adopted child, had attained the age of twenty-one years, and claimed to inherit the real estate of which his adopted mother died seized, as her only heir at law,—subject, however, to the right of curtesy in the surviving husband. In February, 1889, Willie Duff Martin, who, since his adoption, had been known as William Ferguson, conveyed to his adopted father the real estate of which his adopted mother died seized; reciting in the deed that he was a single man, and the only heir of Hannah Ferguson, deceased. Benjamin F. Ferguson, the adopted father, died in the fall of 1897, leaving a last will and testament, by which the premises in controversy in this action were devised to the plaintiffs in error. The defendants in error are the next of kin and heirs at law of Hannah Ferguson, and they brought ejectment for the premises in controversy, making the claim that Willie Duff Martin Ferguson, the adopted son, did not inherit from his adopted mother and that his deed of the premises to his foster father conveyed no title, and that the adopted father had no interest in the premises which he could devise to the plaintiffs in error.

From the foregoing statement, it will be seen that both parties claimed title from Hannah Ferguson; the plaintiffs in error asserting that Willie Duff Martin Ferguson inherited from her as her adopted son; that he conveyed to his adopted father, Benjamin F. Ferguson, from whom they take under the terms of his will; the defendants in error claiming title as the natural heirs at law of Hannah Ferguson; and the material question to be determined is whether, under the articles of adoption, and the decree of the probate court in that proceeding, Willie Duff Martin Ferguson was entitled to inherit from his foster mother, the same as a child born in lawful wedlock.

A determination of this question requires an examination of the proceedings had in the probate court relating to the adoption of Willie Duff Martin by Benjamin F. Ferguson and Hannah Ferguson, and the statute then in

force relating to the adoption of children. Section 797 of title 25, chapter 57 of the General Statutes of 1873, the statute then in force, and which we think is decisive of the question, is as follows:

"The parents, guardians, or other person or persons having lawful control or custody of any minor child, may make a statement in writing before the probate judge of the county where the person or persons desiring to adopt said child reside, that he, she or they voluntarily relinquish all right to the custody of and power and control over such child (naming him or her), and all claim and interest in or to the services and wages of such child, to the end that such child shall be fully adopted by the party or parties (naming them), desiring to adopt such child, which statement shall be signed and sworn to by the party making the same, before said probate judge, in the presence of at least two witnesses; and the person or persons desiring to adopt such child, shall also make a statement in writing, to the effect that he, she, or they freely and voluntarily adopt such child (naming him or her), as their own, with such limitations and conditions as shall be agreed upon by the parties, which said statement shall also be signed and sworn to by the parties making the same before said probate judge, in the presence of at least two witnesses: *Provided*, in all cases where such child shall be of the age of fourteen years and upward, the written consent of such child shall be necessary to the validity of such proceeding: And *Provided further*, whenever it shall be desirable, the party or parties adopting such child may, by stipulations to that effect in such statement, adopt such child, and bestow upon him or her equal rights, privileges, and immunities of children born in lawful wedlock, and such statement shall be filed with and recorded by said probate judge, in a book kept in his office for that purpose."

The statements made by the poor master of Otoe county having charge of Willie Duff Martin, and that of Benjamin F. Ferguson and Hannah Ferguson, and the decree of court entered in the case, are as follows:

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"State of Nebraska, County of Richardson. In the matter of the adoption of William Duff Martin, late of Otoe county, State of Nebraska. Now comes Jacob J. Hochstetler, the poor master of the poor of Otoe county, one of which poor, the said Willie Duff Martin is, and is a county charge and in control and custody of said poor master. That said Jacob J. Hochstetler, for the said county and as such poor master, and as the custodian of the said Willie, minor child, being of the age of two years and six months, does hereby voluntarily relinquish all right of custody, power and control over such child, Willie Duff Martin, and all claim and interest in and to the services and wages of such child, to the end that such child shall be fully adopted by Benjamin F. Ferguson and Hannah his wife, who desire to adopt said child, and do agree to adopt such child, William Duff Martin, as their own, and educate, maintain and clothe such child in a good and suitable manner for such child. This statement is made under the provisions of law for the adoption of children, that the said Willie Duff Martin may be adopted by said Benjamin F. Ferguson and wife.

"JACOB J. HOCHSTETLER,

"Witnesses: *Poor Master of Otoe Co., Neb."*

"THOS. B. STEVENSON.

"M. L. HAYWARD."

[Duly verified.]

"State of Nebraska, County of Richardson. In the matter of the adoption of Willie Duff Martin, late of the county of Otoe, State of Nebraska. Now comes Benjamin F. Ferguson and Hannah, his wife, being man and wife, of said county of Richardson, do hereby aver and state, and each one of us do aver, that the said Benjamin F. Ferguson does hereby voluntarily adopt the said child, Willie Duff (Martin) Ferguson, and the said Hannah Ferguson, wife of Benjamin F. Ferguson, does voluntarily adopt the said child as and by the name of Ferguson, and we do hereby voluntarily adopt Willie Duff (Martin) Ferguson by the latter name as our own, and agree to maintain, clothe and

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educate; and well to nurture in the fear of the Lord, in presence of good manners and habits until the said child arrives at the age of twenty-one years. The child now being two years and six months old.

"Attest:

BENJ. F. FERGUSON.

"THOS. B. STEVENSON.

HANNAH FERGUSON."

"M. L. HAYWARD."

[Duly verified.]

"In the matter of the adoption of Willie Duff Martin by Benjamin F. Ferguson and Hannah Ferguson. Before L. Vandusen, probate judge, February 26, 1870. And now on this 26th day of February, A. D. 1870, this matter came on to be heard in open court, and it appearing to the court that Willie Duff Martin is a minor child, aged two years and six months, and is a county charge and in the custody of Jacob J. Hochstetler, poor master of the county of Otoe, in the state of Nebraska; that Benjamin F. Ferguson and Hannah Ferguson do voluntarily agree to adopt the said Willie Duff Martin by the name of Willie Duff Ferguson, as their own child, and to maintain, clothe and educate said child as though he were their own, until said child arrives at the age of twenty-one years. And it also appearing that the said Jacob J. Hochstetler, poor master as aforesaid, is willing and desirous that said Benjamin F. Ferguson and Hannah Ferguson shall adopt said minor and have the exclusive care and control of the person of said minor and the right and duty of caring for his education and support. Now therefore, it is ordered by the court that the said Benjamin F. Ferguson and Hannah Ferguson have from and after this date the exclusive care, custody and control of said Willie Duff Martin, and that they stand in the same relation to each other as though the said Willie Duff Martin had been born in their lawful wedlock, and that the said Willie Duff Martin have all the right of a child born of the said Benjamin and Hannah Ferguson in lawful wedlock. And that the said Willie Duff Martin hereafter take the name of Willie Duff Ferguson.

"L. VANDEUSEN, *Probate Judge.*"

The common law made no provision for adopting children. We therefore get no light from that law to guide us in this investigation. Most of the states of the Union have enacted general laws providing for the adoption of children and making them the legal heirs of the adopting parents. Of course, the laws of these states are not uniform in substance; the laws of each more or less limiting and restricting the legal status of the adopting parent and the adopted child. The reported adjudications of these states construing the adopting statutes nearly all agree in fixing the legal status of the adopted child as follows: That it is the event of adoption that fixes, under the law authorizing the adoption, the legal status of the adopted child; and the child, by the event of adoption, becomes the legal child of the adopting parent, and stands, as to the property of the adopting parent, in the same light as a child born in lawful wedlock, save in so far as the exceptions in the statute declare otherwise. When the statute authorizes a full and complete adoption, the child adopted thereunder acquires all the legal rights and capacities, including that of inheritance, of a natural child, and is under the same duties. *Humphries v. Davis*, 100 Ind., 274, 280; *Wagner v. Varner*, 50 Ia., 532; *Barnes v. Allen*, 25 Ind., 222; *Burrage v. Briggs*, 120 Mass., 103; *Ross v. Ross*, 129 Mass., 243.

Our own statute appears to differ from that of any other state to which our attention has been called by counsel, and from a somewhat extended research on our own part, we have failed to discover any statute containing similar provisions. The best study which we have been able to give the subject leads us to believe that our statute, as it stood when this proceeding took place, contemplated two kinds of adoption,—one with all the rights of inheritance that would belong to a child by blood, and one where such right of inheritance was not conferred. It seems to contemplate that the mere fact of adoption did not of itself confer the rights and privileges of children born in lawful wedlock, but that, in order to accomplish this result,

an affirmative agreement to that effect should be made by the parties, and included in the statement required to be filed by the adopting parents. This is the view which was taken by this court in *Martin v. Long*, 53 Nebr., 694, where, in speaking on this question, it is said: "An interesting field for discussion is thus opened up, but we agree with counsel for the appellants that 'the action is dependent entirely upon the construction of the articles of adoption,' and it therefore presents no question of general law justifying an extended opinion. It can not be doubted that under the statutes it was perfectly competent for the foster parents to bestow upon the child rights of inheritance as full as if she were their own,—a child born in lawful wedlock, in the awkward phraseology of the statute. Some stress is laid upon the varying terms of the section regarding the articles of adoption and that regarding the decree. The claim is that the child is only entitled to the right of inheritance when it is so stated in the decree. Whether the phrase 'if so stated in the decree' applies to such matters as the rights of the child or only to the custody we need not inquire, because the preceding section requires the decree to follow the articles of adoption; and it could hardly be contended that the court would be authorized by decree to confer such rights except as expressly or impliedly conferred by the articles of adoption." Among other provisions in the declaration filed by the adopting parents in that case was the following: "And we bestow upon her equal rights and privileges of children born in lawful wedlock." Regarding this provision the court said: "The foster parents, if not intending to confer property rights, would not have employed language, the most obvious import of which, as determined by usage, relates thereto. We think that it was the intention to confer upon the child all the rights of children proper, and, in addition thereto, to secure to her in any event, upon her majority, the sum specified in the first clause." A careful reading of the opinion leads us to the conclusion that it was the opinion of the court that

under our statute the adopted child could not claim the right of inheritance from its adopted parents in the absence of a stipulation that he might inherit, contained in the declaration required by statute to be signed and filed by them. This view of the case is further strengthened by the action of the legislature in amending this statute in 1897. The amendatory statute is known as chapter 94 of the Acts of the 21st General Assembly. The ninth section of that act is as follows:

"Unless the terms and conditions in said consent and petition otherwise provide, said person or persons adopting, and the said minor child adopted, shall after adoption, sustain toward each other the usual relation and the adopted child shall have bestowed upon him or her equal rights, privileges and immunities of children born in lawful wedlock of parent and child, and shall have all the right and be subject to all the duties of that relation; and the parents of said adopted child shall, after said adoption, stand relieved of all parental duties toward, and all responsibility for, the said minor child so adopted and shall have no right over it."

One object of the amendment undoubtedly was to make the act of adoption conclusive of the right of the adopted child to inherit, unless, in the words of the act, "the terms and conditions in said consent and petition otherwise provide." This construction of the statute is in accord with the holding in other states. The right of adoption, being unknown to the common law, and repugnant to its principles, is a special power conferred by statute and is governed by the rule that such statutes must be strictly construed. "As against an adopted child the statute should be strictly construed as being in derogation of the general law of inheritance which is founded on natural relationship and is a rule of succession according to nature which has prevailed from time immemorial." *Keegan v. Geraghty*, 101 Ill., 26; *Wallace v. Rappleye*, 103 Ill., 229. "Statutes, so far as they change the general course of descent and distribution of intestate property and

ignore all merit on account of blood, should be strictly construed. *Upson v. Noble*, 35 Ohio St., 655; *In re Chambers*, 22 Pac. Rep. [Cal.], 138.

The plaintiffs in error have cited and rely on *Kofka v. Rosicky*, 41 Nebr., 328, as an authority in this case. We are unable to see any analogy between that case and the one at bar. The facts in that case and the law applicable to the facts are clearly stated in the fourth paragraph of the syllabus as follows:

"A girl about seventeen months old was given by her parents to her uncle and aunt under an agreement that they would adopt her and rear, nurture, and educate her, and that she was to be as their own child, and at their death to receive, or be left, all the property which they might own. She lived with them until they died, some ten years afterward, took their name, did not recognize or know her own father and mother in the true relation, but knew them as and called them uncle and aunt, and knew and recognized her uncle and aunt as father and mother. The uncle and aunt died possessed of real estate in the city of Omaha, the title to which they did not, either by deed or will, transfer to the child. *Held*, That there was such a part performance of the contract by the parties thereto as entitled her to a decree giving her the title to the property, by way of specific performance of the contract."

This statement shows that there was no statutory adoption, and consequently no written statement made by the foster parents containing their agreement relating to the rights of the child to inherit their estate. In the case at bar the statute was followed, and, under our construction of the statute, the right of Willie Martin Ferguson to inherit from his foster parents can be established only by pointing out an agreement to that effect in the written statement required by the statute to be filed by the adopting parties with the county judge. The question does not depend upon oral evidence to establish an agreement, and the terms thereof; but the rights of the child must be as-

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certained from the written statement filed with the county judge, and produced in evidence on the trial. In the case of *Kofka v. Rosicky* the court was to examine and ascertain in the first instance whether any agreement of adoption was ever made, and then the terms of the agreement and the rights of the parties thereunder. Here the agreement is placed before us in the form of a written statement, the true construction of which determines the rights of the parties. In that case the court saw fit to specifically enforce a contract of adoption, which it found had been orally agreed on by the parties. In this, we are called on to construe the statute, and determine whether the child may inherit from its foster parents in the absence of an affirmative statement or agreement that he shall.

If we are correct in our conclusion that the right of the adopted child to inherit depends upon an affirmative statement to that effect contained in the articles of adoption, then the claim of estoppel urged by the plaintiffs in error can have no existence. The right of the child to inherit is determined by those articles, and the caste of descent of the estate of the foster parents is governed alone by the statements therein contained. If these articles provide for the descent of their estate to the adopted child, such descent will be enforced; but in the absence of such a provision all parties will be presumed to know that the adopted child can not claim such a benefit, and the fact that he has lived with his foster parents, has taken and bears their name, has conducted himself toward them as a dutiful child, and is estopped from denying that relation, will give him no greater rights or privileges than the statute creating the relation accords.

This, we believe, disposes of all the questions in the case except the statute of limitations, which was pleaded by the defendants in error. It will be borne in mind that when Hannah Ferguson died in 1888, Benjamin F. Ferguson, her husband, survived her, and took an estate by the curtesy in all her lands. The husband died in 1897,

and during his life and the existence of his tenancy the lands did not descend to the heirs, so as to give them a right of entry, or entitle them to maintain an action of ejectment. *Jackson v. Johnson*, 5 Cow. [N. Y.], 74; *Orthwein v. Thomas*, 127 Ill., 554. In the latter case cited it is held: Children inheriting from their mother real estate of which their father is tenant by the curtesy, are not entitled to possession until after his death, and the statute of limitations can not run against them in his lifetime.

We think that the district court entered the proper judgment in the case, and we recommend its affirmance.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED

On April 9, 1903, the following opinion was filed on rehearing:

1. **Adoption of Children: DECREE: FORCE AND EFFECT.** In rendering the decree provided for in chapter 2, title 25, Revised Statutes, 1866, governing adoption of children, the probate judge acts judicially, and such decree has all the force and effect of a judgment, being subject to collateral attack only for want of jurisdiction.
2. ———: **CONSTRUCTION OF STATUTE: REQUIREMENT OF STATUTE: DECREE.** The statute prescribing the procedure in the adoption of children should be liberally construed, to the end that the proceedings had thereunder, and the decree of adoption made pursuant thereto, may be held valid; substantial compliance with the requirements of the statute being sufficient to sustain the validity of the decree of the probate court.
3. ———: ———: ———: **STATUS OF CHILD.** The decree rendered by the probate court under the provisions of chapter 2, title 25, Revised Statutes, 1866, fixes the status of the child and its adoptive parents; and when such decree, by failure to prosecute error therefrom, is allowed to become final, it will, if in substantial conformity with the provisions and requirements of the statute, be conclusive upon all persons interested in the proceedings.

4. ———: ———: MODIFICATION. Under the provisions of section 580, chapter 1, title 16, Revised Statutes, 1866, a decree of adoption rendered by the probate court under chapter 2, title 25, Revised Statutes, 1866, could be reversed, vacated or modified by the district court at the instance of anyone having an appealable interest therein.
5. ———: ———: COLLATERAL ATTACK. The decree of a probate court rendered under chapter 2, title 25, Revised Statutes, 1866, conferring upon the child full rights of inheritance from his adoptive parents, will not, in a collateral proceeding, many years after its rendition, and after the death of the adoptive parents, be held void for want of jurisdiction on the ground that the statement of the adoptive parents filed in the adoption proceedings fails in specific language to bestow upon the adopted child equal rights, privileges and immunities of children born in lawful wedlock, where a fair and reasonable interpretation of such statement is consistent with the intention so to bestow such rights, and it is manifest that the probate judge so understood and construed the statement of the adoptive parents, and the parents acquiesced in the decree throughout their lives.

KIRKPATRICK, C.

A former opinion in this case was filed in this court May 8, 1902 (page 649, *ante*). The case is here upon rehearing. The defendants in error, the next of kin and heirs at law of Hannah Ferguson, brought an action in ejectment against plaintiffs in error, devisees of Benjamin Ferguson, husband of Hannah, to recover certain premises conveyed to Benjamin by Willie Duff Martin Ferguson, who had been adopted by the Fergusons in his infancy. The court found for defendants in error.

The sole question presented for determination is whether by virtue of certain adoption proceedings had in the county court of Richardson county in 1870, Willie Duff Martin Ferguson, who was therein adopted by the Fergusons, became possessed of the right of inheritance from his adoptive parents, the same as a child born in lawful wedlock. The decree rendered by the probate court so provides in express terms. It is contended by defendants in error that the decree of the probate court providing that Willie should inherit as a child born in lawful wedlock was made

without jurisdiction. This contention may the more clearly be apprehended by the following quotation made from the act governing the adoption of children in force in 1870: "*And provided further*, Whenever it shall be desirable, the party or parties adopting such child may, by stipulations to that effect in such statement, adopt such child, and bestow upon him or her equal rights, privileges and immunities of children born in lawful wedlock, and such statement shall be filed with and recorded by said probate judge, in a book kept in his office for that purpose." Revised Statutes, 1866, Code of Civil Procedure, sec. 797. The statement made by the Fergusons is as follows:

"Now comes Benjamin F. Ferguson and Hannah his wife, being man and wife, of said county of Richardson, do hereby aver and state, and each of us do aver that the said Benjamin F. Ferguson does hereby voluntarily adopt the said child Willie Duff (Martin) Ferguson, and the said Hannah Ferguson, wife of Benjamin F. Ferguson, does voluntarily adopt the said child as and by the name of Ferguson, and we do hereby voluntarily adopt Willie Duff (Martin) Ferguson, by the latter name as our own, and agree to maintain, clothe and educate and well to nurture in the fear of the Lord, in presence of good manners and habits, until the said child arrives at the age of twenty-one years, the child now being two years and six months old."

It is contended that under this statement, made in compliance with the statute referred to, and the provision of that statute above quoted, the probate court had no jurisdiction to enter a decree of adoption conferring upon Willie Duff Martin Ferguson the rights of inheritance. Upon the threshold of the inquiry thus presented, it will be desirable to dispose of two preliminary questions: Are statutes such as that under consideration to be liberally or strictly construed? and, did the probate court, in entering the decree, act judicially or ministerially?

The latter question will be first considered. It is well settled that adoption proceedings were unknown to the

common law, but many of the states of the Union have adopted statutes making provision for the adoption of children. These statutes differ from each other, many of them in material respects, and only one or two have provisions in any degree similar to our own. They may, however, be classified under two heads: First, those that provide for the making of a statement or petition before the probate judge on the part of the person having lawful charge of the child, signifying a readiness to relinquish the right to the custody of and control over the child, and a statement or petition by the person or persons desiring to adopt, signifying their willingness to adopt, and under what conditions, and setting forth other facts required by the statute. The probate court, after hearing, enters a decree on the facts thus presented, giving to the child such incidents of the status of a child born in wedlock as may be authorized under the particular law. Under the other head come those statutes providing, in substance, for a written declaration or statement, rather in the nature of a deed, and so denominated frequently, executed, attested, acknowledged and recorded in the probate court. Of this latter class, of which the Alabama statute may be cited as an instance, the function of the probate court, it is apparent, is purely and wholly ministerial, amounting to nothing further than merely taking the acknowledgment and making the record. No judicial functions are called into action. But in the first named class, there are many incidents of the procedure calculated to show that the proceedings are in a liberal sense judicial. And there can be little doubt that of such is our own. The parties appear before the court,—those having the custody of the child, the child itself, and those desiring to adopt it. Statements of the parties giving over and taking the child are required, setting forth certain facts. Notice of the hearing by publication is provided for. A hearing is clearly contemplated, and after hearing, the statute provides for the rendition of a decree by the court. Nothing, it would seem, could be more clearly and manifestly

judicial. The distinction between adoption under such a procedure as that indicated, and adoption by deed would seem to be sufficiently obvious. In the one case the parties appear, notice to all interested is given, a hearing is had, and the court pronounces a judgment. In the other, the parties adopting make a statement, it is attested, acknowledged and recorded, and the act of adoption is *eo instanti* complete. We think that proceedings under statutes similar to ours are always regarded as judicial. *Brown v. Brown*, 101 Ind., 340. And if this proceeding was judicial, it can, of course, not be collaterally impeached for any error, however gross, that may have intervened between the acquirement by the probate court of jurisdiction of parties and subject matter, and the rendition of the decree. This, it will be conceded, is elementary, and citation of authorities is unnecessary, unless, perhaps, it may be successfully urged that no appeal lay from the decree of the probate court, in which event, it may be suggested an erroneous decree ought not to be binding. Section 580, chapter 1, title 16, Revised Statutes, 1866, p. 496, entitled "Error in Civil Cases," provides as follows. "A judgment rendered, or final order made by a probate court, * * * or any other tribunal, board or officer, exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court." It is not now, and we think, never has been the policy of the law to deny to any party the right to review. That right is guaranteed by the constitution. The section from the statute in force in 1870, just quoted, is clearly broad enough to include the decree of adoption by the probate court. It is an order or decree of an officer inferior to the district court, and exercising judicial functions. It provides for reversal, vacation or modification of such order or judgment, and was amply sufficient to enable any one dissatisfied with the decree as entered, and who had an appealable interest, to have obtained a review thereof.

The other question suggested relates to the spirit that should govern in the adjudication of controversies arising

under the provisions of adoption statutes, whether they shall be construed strictly, as in derogation of the common law, or liberally, as being laws humane and beneficent in their intendments and provisions, intimately involving the interests of those who by nature are helpless, and unable by reason of inherent limitations to see to the strict observance of every detail of the statutory procedure. Our examination has revealed to us that courts, called to construe these statutes, have been variously disposed, some being wholly committed to the doctrine that, being wholly statutory, and unknown to the common law, the rule that statutes in derogation thereof shall be strictly construed, applies, and that the proceedings must be tested by a rigid inspection of the requirements of the statute, no one of such requirements being less important than another. *Ex parte Clark*, 87 Cal., 638, 641. We have given this matter close consideration, and are convinced that the *Clark Case*, *supra*, and the other cases in which language of substantially similar import is used, proceed upon a mistaken theory. This is especially true in states like our own, where the common-law rule cited has been abrogated by specific statute. Code of Civil Procedure, sec. 1. Adoption statutes are peculiarly beneficent and altruistic. Their purpose is wholly humane. By reason of their enactment, much misery, otherwise inevitable, has been prevented, and the happiness, of a most permanent and lofty character, thereby engendered is practically incalculable. Childless parents have been provided with objects upon which to bestow their affections, and orphans have been snugly entrenched in homes of comfort and even of luxury, brought thereby under the most valuable of influences, and, perchance, saved from swelling the ranks of the vicious and criminal. These are clearly statutes in favor of which much can be said; against which, nothing. As has been aptly stated: "In cases of this kind it is not the duty of the court to bring the judicial microscope to bear upon the case, in order that every slight defect might be enlarged and magnified, so that a reason might be found for declar-

ing invalid an act consummated years before, but rather to approach the case with an inclination to uphold such acts, if it is found that there was a substantial compliance with the statute." *Nugent v. Powell*, 4 Wyo., 173. And in *Parsons v. Parsons*, 101 Wis., 76, this language occurs: "We would feel bound to repudiate the doctrine of strict construction contended for vigorously by appellant. The adoption statute is a humane provision, which looks to the interest of children primarily. That is its controlling idea and policy. Therefore, every reasonable intendment should be indulged, in case of doubt, in the line of promoting that object. Other courts have taken the same view, but, if it were otherwise, our duty to carry out an obvious legislative intent would be the same. * * * It has made, and is making, a multitude of happy homes, happy parents, happy children, and valuable members of society, and no narrow construction should be indulged in that will tend to defeat a result so obviously intended and in every way so beneficial." We incline strongly to the view as cogently set forth in the language just quoted, and believe that the sounder rule is that doubts arising under the statute should be resolved in favor of the validity of the proceedings had and the decree entered. So much for the character, scope and purpose of the act under consideration, and the rules and analogies that are to govern in its construction.

It is a necessary deduction from the foregoing that the decree of adoption is not impeachable for error, because of the axiomatic and somewhat trite reason that all courts have jurisdiction to err. The pivotal point, therefore, is, did the probate court have jurisdiction to decree that the adopted child should possess the rights of a child born in lawful wedlock? In the statement made by the adoptive parents, as directed by statute, no specific mention is made of a desire to confer upon the child the rights of inheritance, but it does not follow that such meaning may not with reasonable and sufficient certainty be gathered from the statement. We have read this statement with the

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greatest care, and are unable to discover anything therein in any way inconsistent with the decree. The qualifying words, "as our own," when given the meaning to which they are the most naturally susceptible, would seem clearly to support the decree. If the child had in fact been that of the Fergusons, its right of inheritance would be undisputed. Was it their intention to make him "their own?" Their statement answers in the affirmative. The stipulation to clothe and maintain the child until he is twenty-one years old can not be said to be in the nature of a limitation upon the obligations otherwise intended to be assumed. Their obligation would have been nothing less than this, assuming that the child grew to the full stature of manhood in the possession of his natural faculties, had he been born to them in lawful wedlock, as the legal obligation to maintain a child, unless the child becomes chargeable to the public as a pauper, ceases as soon as the child is of age. 2 Kent, Commentaries, *192; *Templeton v. Stratton*, 128 Mass., 137. Nothing, therefore, was added to or detracted from the obligation of the parents by this statement.

Reference has been made by defendants in error to a subsequent amendment of the adoption statute, the effect of which has been to provide that the rights of inheritance shall attach to the adopted child unless specific provision has been made against such right, and it is said that this is legislative construction to the effect that under the law of 1870, the right of inheritance depended upon an affirmative offer to confer it by the adoptive parents. Of this amendment, it may be said that it is in line with the more recent judicial construction of adoption statutes, namely, that they should be held to confer all the rights of natural children, unless a contrary intention affirmatively appears. But we do not think the effect of this amendment can be to bind this court to a more rigid rule of construction of the law of 1870 than the spirit of that act and the usual canons of interpretation would warrant had the act been permitted to remain as it then was; and

the question still remaining for consideration would be whether the probate court, at that time, had jurisdiction, under the particular pleadings and facts before it, to confer, by its decree, the right of inheritance.

There is much in this statute to warrant the belief that it was the legislative intent that the decree provided for should fix the status of the child. "All decrees entered in such case," it is therein said, "in conformity with the provisions and requirements of this chapter, shall be conclusive upon all the persons interested in such proceedings or matter"; and further, "all relations of parent and child, agreeably to such stipulations and the decree of the probate court, shall attach, and such child, * * * if so stated in such decree, shall be subject to the exclusive control and custody of such parent or parents, and shall possess and enjoy all the rights * * * of children born in lawful wedlock." Revised Statutes, 1866, sec. 800, Code of Civil Procedure. In other words, there is no adoption until there has been a decree rendered, and after the rendition of the decree, the status of the parties must be determined from an inspection thereof, as in the case of other decrees, unless it is void for want of jurisdiction. It is true, that by the terms of the statute the decree is only made conclusive when in conformity with "the provisions and requirements of this chapter"; but does this mean that no adoption decree will be valid unless every provision of the statute has been strictly and literally complied with? or, rather, that the decree depends for its force and effect upon substantial compliance with the requirements of the statute? We are firmly of the conviction that judicial construction should not be carried further than the latter alternative. We doubt whether a court would, after many years had elapsed, during which all parties appeared to have been content with the event of the proceedings, hear the objection that the notice required had not been published in exact compliance with the statute; or that one of the statements had been attested by less than two wit-

nesses, or by none at all, or any other technical objection of like import. That the consent of the child, if over fourteen years, is made imperative is obviously just, as the law wisely looks upon the wishes of the child, as soon as its accumulating years permit of a realization of its own best interests, as being matter of substance. Hence the specific provision, founded in principle, that the validity of the adoption of a child of the age of fourteen years must look for its basis in the consent of the child.

But we think the act as a whole should receive a broad and liberal construction. We are not without eminent authority in saying, and the fact is abundantly fortified by considerations of justice and humanity, that the primary person interested in these proceedings is the child. *Parsons v. Parsons*, 101 Wis., 76. It was least of all capable of seeing to the strict observance of the detailed requirements of the statute, if such observance is to be made the basis of a valid decree.

After consideration, we have been led to the conclusion that the jurisdiction of the probate court to decree that the child should inherit must be determined by the single inquiry whether he was warranted in concluding that such was the intention of the adoptive parents. And if we assume that he had no power to make a decree broader than the statement of the adoptive parents, on the principle already announced, that he acted judicially, it must, we think, be conceded that he was charged with the duty and the obligation to determine the meaning of the language used. To do so was necessarily involved in his act of pronouncing the decree; and the question would then be whether the articles of adoption either expressly or impliedly conferred rights of inheritance. *Martin v. Long*, 53 Neb., 694, 698. It is, of course, obvious that the poor-master, who had the legal custody of the child, and who surrendered it for adoption, could by no act of his confer the right of inheritance. But it should not be overlooked that his consent, which was essential, might have been largely governed by the belief that such right was

proposed to be conferred. It is equally manifest that the court could not have granted by decree the right of inheritance against the express wishes or intent of the adoptive parents; but it is no less true that the discretion in him by law vested, to refuse to enter a decree and dismiss the matter, if it appeared to his satisfaction that the proceedings were not for the best interest of the child, might be largely influenced by his belief, warranted by the statement made by the adoptive parents, that they proposed to confer this right.

Referring again to the statement made by the Fergusons, we find that they offer therein voluntarily to adopt the child as their own, by the name of Ferguson, to maintain, clothe and educate him until twenty-one years old. A reading of the decree rendered by the probate judge makes it obvious, we think beyond the possibility of reasonable doubt, that the probate judge understood that he was embracing in the decree the wishes and intentions of the parties. Any other view would be in hostility with every hypothesis except that of fraud. The decree contains, first, certain findings of fact, e. g., the age of the child, thus negating the jurisdictional requirement of the consent of an older child; the consent of the person having custody of the child; and that the Fergusons voluntarily adopt the child by their name, and "as their own child, and to maintain, clothe, and educate said child as though he were their own, until said child arrives at the age of twenty-one years," whereupon follows, as a conclusion from the foregoing premises, a judgment or decree expressly conferring rights of inheritance. It is certainly to be assumed that the Fergusons knew that this decree had been entered, and knew what it provided. Throughout their lives they appear to have been perfectly satisfied therewith. This argues strongly in favor of the conclusion that the probate judge correctly reflected their own intentions in the decree.

We are not unmindful of the rule that any doubt as to the jurisdiction of a court of limited jurisdiction which

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arises from the silence of the record must be resolved against the jurisdiction. But this rule is not in conflict with the application of a rule of liberal construction brought to bear upon the statement made by the Fergusons under the statute governing adoption. If such statement can with reason be held to express the intention to confer the right of inheritance, and for the purpose of construction we see no difficulty in having recourse to the subsequent conduct of the parties with reference to the order made, then the court's jurisdiction so to decree does affirmatively appear.

The statute in force at the time seems to have been substantially complied with. As we view them, the stipulations and conditions in the statement of the Fergusons are broad enough to include the right of inheritance, and the decree of the court is in accordance therewith. The substantial conformity of the decree with the requirements of the statute makes it conclusive, and all the relations of parent and child therein enumerated must be held to attach.

It is therefore recommended that the decision heretofore rendered in this cause be overruled, and the judgment of the trial court be reversed, and the cause remanded for further proceedings.

HASTINGS and LOBINGIER, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former opinion rendered in this case is overruled, the judgment of the district court reversed and the cause remanded.

REVERSED AND REMANDED.

Second motion for rehearing filed.

GEORGE GRAY V. JOHN PETERSON.

FILED MAY 8, 1902. NO. 10,095.

Commissioner's opinion, Department No. 3.

Statute of Frauds. Any distinct and unambiguous act evidencing an intention by the seller to part with the possession and an intention on the part of the buyer to acquire the possession, accompanied by a tradition of the property from the premises of the former or from neutral ground to the premises of the latter, satisfies the statute of frauds and suffices to transfer the title, so that the former may recover the purchase price, if it remains unpaid, and the latter assumes the risk of safe-keeping and may defend his possession against all the world.

ERROR from the district court for Knox county.
Tried below before ROBINSON, J. *Reversed.*

W. R. Ellis, for plaintiff in error.

A. A. Welch and *W. D. Funk*, *contra.*

AMES, C.

This cause was submitted to the court upon oral argument and brief for the plaintiff in error alone, and his statement of facts, which upon a comparison with the record, appears to be accurate, will be adopted for the purposes of this opinion: Plaintiff was a stock buyer in the village of Bloomfield, Nebraska, and defendant was a stockman residing a few miles from said town. A few days prior to July 18, 1896, plaintiff and defendant had a conversation regarding the latter's forty head of steers then ready for market. Plaintiff, at defendant's request, went out to see the steers once or twice, and finally it was agreed that plaintiff should order cars in which to ship them on a certain day,—July 18th,—and that defendant would drive them in on that day, and, if he did not sell to plaintiff, he would ship them himself in the cars plaintiff ordered. Plaintiff accordingly procured cars, and defendant drove his steers to Bloomfield on the morning

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of the day agreed, and placed them in the stock yards of the railroad company, after which he hunted up plaintiff, and the two renewed negotiations, which were finally terminated in an unconditional sale of the forty head of steers by defendant to plaintiff at \$3.60 per one hundred pounds. The parties then, in pursuance of the contract, went to the stock yards and proceeded to weigh the steers. The stock yards of the railroad company, in which defendant had placed his steers, consisted of two separate yards and a loading chute, and were constructed of heavy planks, and made extra strong and substantial. The plaintiff had a private yard immediately adjoining the railroad yards on the west, which was constructed of inch boards, and was frail and light as compared to the company's yards, and did not resemble the latter in any particular. An alley extended along the south side of the yards of the railroad company and plaintiff, and in this alley, on the south side of plaintiff's yards, was located the enclosed scales on which the steers were weighed. They were driven out of the stock yards in drafts of two each, and weighed, after which each draft was driven from the scales, and taken by plaintiff and placed in private yard. In this manner, the weighing proceeded until all the steers were weighed and turned over to plaintiff, and by him placed in his yard, the defendant participating in the weighing and delivery of all the steers, and making no objection to the same, or to the plaintiff's taking possession of them, except one casual remark to the effect that he regretted that he had sold the steers. After the weighing and delivery had been completed, plaintiff took about half of the steers, or one car load, from his yard, and drove them into the chute, preparatory to loading into the cars, when defendant for the first time objected, saying the steers had shrunk too much, and that he would ship them himself. Plaintiff protested that the steers were his property; that, if defendant was not satisfied with the weights, he might weigh them over any scales in town, but he would not consent to defendant

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rescinding the contract. Defendant made no claim of fraud or improper weighing, but simply stated that the steers had shrunk so much that he could afford to ship them himself on that weight, and he forcibly took possession of the steers and shipped them to and sold them on the same market on which plaintiff would have sold them, and at a net profit of \$130 over what plaintiff would have paid for them under the contract, which amount is the measure of damages sued for in this action. It will be noted that plaintiff had made no payment on the steers, but no question was or is raised because of this, and it is expressly stipulated and in evidence "that the said plaintiff had sufficient money on deposit in the Farmers & Merchants' State Bank of Bloomfield, Nebraska, to pay to defendant the amount of the value of the steers described in plaintiff's petition, and it is agreed that no question is to be raised on the trial because of the fact that the plaintiff did not pay to defendant or tender to defendant the amount set forth in said petition as the purchase price of said steers." Upon this state of facts there can be no doubt that the district court erred in supposing that there had not been a sufficient delivery and acceptance of the steers to satisfy the requirements of the statute of frauds. Any distinct and unambiguous act evidencing an intention by the seller to part with the possession, and intention on the part of the buyer to acquire the possession, accompanied by a tradition of the property from the premises of the former, or from neutral ground to the premises of the latter, satisfies the statutes of fraud, and suffices to transfer the title so that the former may recover the purchase price, if it remains unpaid; and the latter assumes the risk of safe-keeping and may defend his possession against all the world. *Wyler v. Rothschild*, 53 Nebr., 566. "The intention of the parties at the time as to the delivery must prevail, even if there be something yet to be done to complete it. *Somers v. McLaughlin*, 57 Wis., 358, 15 N. W. Rep., 442. Correctly speaking, what is required to satisfy the statute of frauds is not the

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delivery of the goods by the vendor, but the acceptance of them by the vendee, although, of course, this must be with the consent of the former, and be accompanied in some sense by a delivery; but, after all, the controlling act is that of the buyer. *Powder River Live Stock Co. v. Lamb*, 38 Nebr., 339, and cases cited; Browne, Statute of Frauds, par. 315, *et seq.* This author, after a review of the authorities, says that the rule may be broadly stated that any acts from which it may be inferred that the buyer has taken possession as owner may be regarded as sufficient. But it can not be necessary to pursue the subject further. The circumstances and conversations detailed in the foregoing statement of facts put the question of the acceptance and delivery of the cattle and the intention of the parties, especially of the buyer, beyond controversy.

After the preparation of the foregoing opinion a brief was filed by the defendant in error, and brought to our attention. We have carefully read and considered the same, but do not find that it points out any important error in the foregoing statement of facts, or in the above application of the law thereto. On the contrary, we find in the authorities quoted in the brief a substantial unanimity with this opinion as to the principles governing the question at issue. The principal object of the statute of frauds is the protection of the alleged vendee. If he has accepted and received the goods or a part thereof with the consent of the vendor, the second clause of the statute is satisfied; the title passes, and he becomes bound, although there be no writing or part payment of the purchase price; otherwise not.

It is recommended that the judgment of the district court be reversed, and a new trial awarded.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and a new trial awarded.

REVERSED.

EMMA M. PITMAN ET AL. V. ELBERT IRELAND.

FILED MAY 8, 1902. No. 11,478.

Commissioner's opinion, Department No. 3.

Mortgagor: RIGHT OF INTERVENTION. A mortgagor who has conveyed lands by an unconditional deed of general warranty, is entitled to intervene for the purpose of pleading usury in an action to foreclose the mortgage.

ERROR from the district court for Sheridan county.
Tried below before WESTOVER, J. *Reversed.*

Albert W. Crites, for plaintiffs in error.

W. W. Wood, *contra.*

AMES, C.

Benjamin Lammers procured a loan from the Showalter Mortgage Company, a corporation, and to secure its payment executed and delivered his note and a mortgage on certain real estate. By various mesne conveyances the lands were conveyed to the plaintiff in error Pitman, and by sundry mesne assignments the note and mortgage came to the defendant in error, Ireland. Ireland brought this action to foreclose the mortgage, to which he made the holder of the title, Pitman, sole party defendant. Lammers applied for leave to intervene for the purpose of pleading usury, and his motion was denied. He and Pitman bring the case here, assigning such denial for error.

In our opinion the application should have been granted. The pleadings show that Pitman acquired the land by an unconditional deed of general warranty, making no reference to the mortgage. It is elementary law that when the grantee in such a conveyance is attacked by a claim which, if maintained, may divest him of his title, he has a right to "vouch" his warrantor, as it is called; that is, he may notify the latter of the pendency of the suit and

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require him to come in and defend at his peril, if he fails so to do, of being concluded by its results in a subsequent action against him upon the covenants in his deed. Rawle, Covenants for Title, 228, *et seq.* Now the application of Lammers for leave to intervene, was intended to accomplish precisely this purpose, which was necessary as well for his protection as for that of his warrantee, and the latter not less than the former was entitled to have the amount of the incumbrance diminished by any lawful means, instead of being driven to his personal action upon his covenants.

It is recommended that the judgment of the district court be reversed, and the case remanded for further proceedings according to law.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the case remanded for further proceedings according to law.

REVERSED AND REMANDED.

CRETE MUTUAL FIRE INSURANCE COMPANY V. THOMAS
PATZ.

FILED MAY 8, 1902. No. 11,687.

Commissioner's opinion, Department No. 3.

1. **Evidence.** Evidence examined, and *held* sufficient to sustain the verdict.
2. **Instruction.** Instruction, tendered and refused, examined, and *held*, its refusal was proper.
3. ———. It is not error to refuse an instruction which is broader than the evidence, nor where the same ground is covered by an instruction given by the court on its own motion.

ERROR from the district court for Saline county. Tried below before HASTINGS, J. *Affirmed.*

Abbott & Abbott, for plaintiff in error.

Fayette I. Foss, B. V. Kohout and R. D. Brown, contra.

ALBERT, C.

This action was brought by Thomas Patz against the Crete Mutual Fire Insurance Company to recover a balance alleged to be due him for services rendered by his minor daughter at the instance and request of the defendant. The defendant denies any contract, either express or implied, for such services and alleges, in effect, that whatever services the said minor rendered were simply in assisting the plaintiff, who was secretary of the company, at his instance and request, for his exclusive benefit, and without the knowledge or consent of the defendant, and that whatever payments were made for such services were obtained by fraud, practiced on the defendant by the plaintiff, and without its knowledge or consent. The defendant asks judgment against the plaintiff for the amount of such payments. The allegations of the answer are put in issue by the reply. There was a verdict and judgment for the plaintiff. The defendant brings the case here on error.

The principal ground relied upon for a reversal of the judgment of the district court is that the verdict is not sustained by sufficient evidence, especially that there is a failure to show any contract of hiring, either express or implied. We have gone over the testimony. In our opinion it is sufficient to sustain the verdict on all essential points.

The defendant tendered the following instructions:

"In this case the plaintiff seeks to recover from the defendant insurance company for services of a minor daughter of the plaintiff alleged to have been performed by her for the defendant. If you shall find from the evidence that the plaintiff was, at the time such alleged services were performed, employed by the defendant as its secre-

tary, at a fixed salary, and that it was his custom to have his children with him in the office of the company rendering him assistance in various ways, in such case the law does not, in the absence of an express agreement to pay for such help, raise any presumption of a promise on the part of the defendant to pay for such services; and the plaintiff can not recover in this case.

"If you shall find from the evidence that there was no express contract of hiring in this case, and by application of the foregoing instructions to the evidence, that there was no implied contract of hiring, and shall further find from the evidence that the money which the plaintiff claims was paid for such hiring, was by him, while he was acting as secretary to the defendant, secretly so applied by him without the knowledge or consent of the board of directors of the defendant, then such use of the money was unwarranted and you should find for the defendant to the full amount of the money which the evidence shows to have been so taken and used by the plaintiff; unless you shall further find from the evidence that the defendant by its officers has since ratified such taking and use.

"It is true that the law is such that if one sees another performing labor for him, which is beneficial to him and does not object but allows the work to go on and avails himself of the benefits, the person for whom the labor is performed is bound to pay for such labor as it was reasonably worth, but no more; hence in this case, if you shall find from the evidence with the foregoing instruction applied thereto that the plaintiff is entitled to any pay for the services rendered by his daughter to the defendant, you will find the value of the services as shown by the evidence; and if the amount received by the plaintiff, as shown by the plaintiff's petition is less than the amount so found, you will find for the plaintiff for the balance. But if you shall find it to be less, then under the pleadings in the case you will find for defendant for such an amount as the money claimed to have been payments exceeds the value of the services so rendered."

The instructions tendered were refused, and their refusal is now assigned as error.

As to the first, it does not state the law. It is vitiated by the closing clause. It says, in effect, that, if it was the custom of the plaintiff to have his children assist him at his work for the defendant, there can be no implied contract to pay for the services of any one of the children, no matter under what circumstances they may have been rendered. As to the second, the court on its own motion instructed the jury that no evidence had been introduced, and no claim made by the defendant, as to the money paid by the plaintiff for the services of his daughter. No exception was taken to such instruction. Hence we must assume it was a fair statement of the facts in that behalf. If it was, there was no evidence on which to base the instruction tendered by the defendant on that point. As to the third, the same ground is covered by the instructions given by the court on its own motion. Consequently it was not error to refuse it.

Complaint is made of the rulings of the court during the progress of the trial. They are not argued, nor do we find they afford any just ground for complaint.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA V. MISSOURI PACIFIC RAILWAY COMPANY.

FILED MAY 21, 1902. No. 11,269.

1. **Crimes:** THIS COURT: COGNIZANCE: CONSTITUTION: GRANT: APPELLATE JURISDICTION. The only authority this court has to take cognizance of crimes is that given by the constitution in the grant of appellate jurisdiction.

2. **Legislative Thought: MOULD OF CRIMINAL LAW: PRESUMPTION: CRIMINAL JURISDICTION.** When the legislative thought is cast in the mould of the criminal law, it will be presumed, nothing appearing to the contrary, that the remedies contemplated were those generally used in courts exercising criminal jurisdiction.
3. **Maximum Rate Law.** The provisions of section 9, of the act of 1893 known as the "Maximum Freight Rate Law," being punitive and not remedial, are to be enforced in accordance with the procedure of the Criminal Code.

ORIGINAL action by the state to recover penalties provided for a violation of the maximum freight rate law. *Dismissed.*

Frank N. Prout, Attorney General, and Norris Brown, for the state.

Adolphus R. Talbot, James W. Orr and Bailey P. Waggener, contra.

SULLIVAN, C. J.

This action was commenced in this court to recover the sum of \$435,000 claimed by the state from the Missouri Pacific Railway Company on account of nineteen alleged violations of the act of 1893, commonly known as the "Maximum Freight Rate Law." No question is made as to the validity of the statute, and the defendant, by its counsel, disclaims any wish or intention to evade responsibility for the acts described in the petition. It denies, however, that the case is one which this court has original authority to hear and determine. The argument urged in support of the jurisdictional objection is that the action is grounded upon a statute providing for the punishment of crime; that its purpose is to vindicate public justice, and that it is, therefore, in substance, and should be in form, distinctively criminal. The provision of the constitution (sec. 2, art. 6) conferring jurisdiction upon this court declares that "It shall have original jurisdiction in cases relating to the revenue, civil cases in which the

state shall be a party, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as may be provided by law." Clearly, the only authority we have to take cognizance of crimes is that embraced in the grant of appellate jurisdiction. The right of the state, then, to maintain the action depends upon the character of the action. If it is a civil suit, we have jurisdiction; otherwise we have not. The act of 1893 fixes maximum rates for the transportation of freight by common carriers, and gives a civil action to every person who is injured by a violation of any of its provisions. Immediately following the section providing for the redress of injuries suffered by private persons is the section upon which this action is founded. It is as follows: "Sec. 9. That in case any common carrier subject to the provisions of this act, shall do, or cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall upon conviction thereof, be fined in any sum not less than one thousand (\$1,000) dollars, nor more than five thousand (\$5,000) dollars for the first offense; and for the second offense not less than five thousand (\$5,000) dollars, nor more than ten thousand (\$10,000) dollars; and for the third offense, not less than ten thousand (\$10,000) dollars, nor more than twenty thousand (\$20,000) dollars; and for every subsequent offense and conviction thereof, shall be liable to a fine of twenty-five thousand (\$25,000) dollars; Provided, That in all cases under this act either party shall have the right of trial by jury." Session Laws, 1893, ch. 24. The attorney general contends that every violation of this section gives rise to a civil action in favor of the state, and in support of his contention cites *Mitchell v. State*, 12 Nebr., 538. In that case it was held that a civil action would lie to recover a penalty under a statute providing that a licensed vendor of malt, spirituous and vinous liquors, making sales in violation of law, should "forfeit and pay for each offense the sum of twenty-five

dollars." In *State v. Sinnott*, 15 Neb., 472, it was held under a like statute that the state might enforce its right to the penalty by a criminal prosecution. These decisions are consistent. Where the legislature has not indicated a preference, penalties and forfeitures may be recovered by the state in either a civil or criminal action. But the rule with respect to fines is different. The primary definition of a fine is a pecuniary punishment inflicted by the sentence of a court exercising criminal jurisdiction. And this is the sense in which the term is used in common speech. We do not remember having ever heard the action of a court giving judgment in a civil case described by the use of the word "fine." It was, of course, within the power of the legislature to provide for the enforcement of the law by civil action, but the evidence that it intended to do so is entirely wanting; the language it employed is significant: it spoke in the terminology of the criminal law. If a civil suit was really contemplated then we have here an unexampled perversion of technical terms, a studious shunning of familiar and appropriate forms of expression, an obvious effort to disguise the legislative purpose. Every transgression of the section quoted is characterized as an "offense," the means by which the law is to be enforced is described as a "prosecution," the verdict is called a "conviction,"* and the judgment a "fine." These words abound in the Criminal Code and they are associated in popular thought with laws for the prevention and punishment of crime. They were used in the statute as signs of ideas; their office was to describe what was passing in the legislative mind, and they show conclusively, it seems to us, that the legislature was not thinking of either civil law or civil remedies. The legislative thought was not cast in the mould of the criminal law by accident. A New Hampshire statute relating to the sale of imitation butter declared that any person violating its provisions should "forfeit and pay a fine of \$50, and for a second

*Not till judgment is rendered on a verdict of guilty, is the accused convicted. *Faunce v. People*, 51 Ill., 311.—REPORTER.

and each subsequent offense a fine of \$100," to be recovered in any court of competent jurisdiction; half the fine so recovered to go to the complainant and half to the county where the offense was committed. In *State v. Marshall*, 64 N. H., 549, it was held that, "In the absence of any special provision as to the mode of procedure, the use of the word 'fine' determines the form of the remedy." This decision was approved and followed by the supreme court of Minnesota in *State v. Horgan*, 55 Minn., 183. These, so far as we know, are the only cases in which the precise question has been decided. The Criminal Code expressly declares that all fines therein provided for shall be enforced by criminal action, and it was, beyond all doubt, the intention of the legislature that the punitive provisions of the act in question should be enforced in like manner.

The action is dismissed for want of jurisdiction.

DISMISSED.

NOTE.—*Mitchell v. State*, 12 Nebr., 538, cited in the foregoing opinion, was a case which arose under the old law, General Statutes, 1873, section 574, on page 852. The case of *Sinnott v. State*, 15 Nebr., 472, arose under the Ames Law, Compiled Statutes, 1901, section 14 of chapter 50. As stated in the foregoing opinion, these decisions are consistent; but what does COBB, J., the writer of the latter opinion, mean by this language of Judge Leavitt (which he cites with approval on page 475): "But if no one chooses to avail himself of this right [to prosecute by civil process], by instituting a suit, the guilty person may be proceeded against by indictment." Are the remedies cumulative? Are they elective? In other words, can you collect by civil process, and afterward indict? Judge Leavitt's language (*United States v. Bougher*, 6 McLean [C. C.], 277, 281) certainly implies that either an action in debt or indictment would lie. If so, can a judgment in an action for debt furnish a basis for a plea of *autrefois acquit* or *autrefois convict* to an indictment for the same offense?—REPORTER.

STATE OF NEBRASKA, EX REL. CARL C. WRIGHT, RELATOR,
V. EZRA P. SAVAGE, GOVERNOR, RESPONDENT.*

FILED MAY 21, 1902. No. 12,542.

1. **Right of Courts: JUDICIAL QUESTIONS: CONSTITUTION.** The right of the courts to determine all judicial questions, whenever or however they may arise, is given by the constitution in explicit terms and is indisputable.
2. **Right of Executive Officers.** But equally clear and incontestable is the right of the executive officers named in the constitution to exercise all powers properly belonging to the executive department.
3. **Judicial Authority: JUDGMENT: COERCIVE PROCESS.** Considering the matter theoretically, and leaving practical results and past adjudications entirely out of view, it would seem that the farthest limit of judicial authority in mandamus proceedings against officers of the executive department, is to hear and determine; to give judgment, but not to enforce it by coercive process.
4. **Exemption From Mandamus: OFFICIAL RANK.** The principle of exemption from mandamus is grounded upon a distinct constitutional inhibition (Constitution, art. 2, sec. 1), and does not at all depend upon official rank. Whether the writ of mandamus should be granted or refused has been made to depend, in every case decided by this court, upon the character of the act in question and not upon the office of the respondent.
5. **Judiciary: MANDAMUS TO BRANCH OF GOVERNMENT.** The theory that the judiciary, in issuing a mandamus to a member of the executive branch of the government, is thereby indirectly, and in violation of the constitution, exercising power properly belonging to the executive department, has been repudiated by this court in a long line of decisions.
6. **A Mere Ministerial Duty.** The established doctrine in this state is that when a law, in positive terms, enjoins upon the governor, or other officer of the executive department, a mere ministerial duty, leaving him no choice or discretion in regard to the matter,—no judgment to exercise as to whether he will or will not act,—the writ of mandamus may issue, and its issuance is an appropriate exercise of judicial power.
7. **Res Judicata: LITIGANTS: PRIVACY: SEALED AND CLOSED QUESTION.** The doctrine of *res judicata* is that a question once determined by a judgment on the merits, is forever settled, so far as the litigants and those in privity with them are concerned. The question decided is, while the decision stands, a sealed and closed question.

*Rehearing allowed. See opinion on page 702, *post*.

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8. **Public Officer: SUCCESSOR: PRIVACY.** A public officer is regarded as being in privity with his predecessor when both derive their authority from the same source.
9. ———: **JUDGMENT: SUCCESSOR.** A judgment against a public officer in regard to a public right, binds his successor in office.
10. **Thing Adjudicated: SOVEREIGN: CITIZEN.** All litigants are affected by the rule of the thing adjudged; it is equally binding upon the sovereign and the citizen.

ORIGINAL proceeding in mandamus to require the governor to appoint a fire and police commission for the city of Omaha. *Writ denied.* On rehearing, *writ allowed*, but not formally issued. See page 702.

Frank T. Ransom, William F. Gurley, Carl C. Wright and John F. Stout, for relator:

The respondent in his return to the writ claims that, as he is governor, this court has no jurisdiction over him as such officer in such matters as are involved in this controversy. He claims that as governor he is exempt from mandatory process issuing out of this court, and especially so where the action is one executive in character. Chief Justice Marshall laid down the following rule for a case like this:

It is not by the office of the person to whom the writ is directed, but by the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. *Marbury v. Madison*, 1 Cranch [U. S.], 137.

This rule has been generally accepted, and courts have since held that the judicial department has jurisdiction over the chief executive to enforce the performance of a purely ministerial duty imposed by a legislative act. Without present reference to the assumed exemption of the governor from obedience to the laws of the state, as construed by this tribunal, created and clothed with jurisdiction, by the constitution, we will proceed to examine into the nature of the thing to be done.

The power to appoint, delegated by the law providing

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for fire and police commissioners, is not one that inheres in the executive by virtue of any provision of the constitution. It was not necessary to confer that power upon the executive. It could have been conferred upon any other officer or upon any existing board; or the legislature could have created a board and then have conferred jurisdiction upon it. The thing to be done is not an independent executive act. The legislature conferred the power to appoint. The legislature can take it away. The power to appoint is not conferred by the constitution, either in express terms or by implication. The appointment is purely a ministerial act.

This court has decided that a writ of mandamus can be issued to compel the governor, as member of a canvassing board, to canvass election returns and declare the result of an election. *State v. Thayer*, 31 Nebr., 82. This duty of the governor, as member of a canvassing board, was conferred by a legislative act, as was the appointing power involved in the case at bar. There is no distinction to be drawn between the two acts. As to the power of the legislature to confer such authority at its will, see *State v. Bemis*, 45 Nebr., 731.

The cases where the question has been before the courts are collated in an article in the 3d volume of the Lincoln Law Review, page 335, and also in the majority and minority opinions in *People v. Morton*; 156 N. Y., 136, 41 L. R. A., 231, and in briefs published therewith. We will not attempt to digest the decisions of this court on the question. The rule deduced from *People v. Morton*, *supra*, is that the sovereignty is in the people. They have delegated the power to rule to three departments. In England the power to govern originally vested in the king. From time to time the king made grants or modified his power to govern until parliament was evolved; and parliament created the judiciary. This distribution of powers is continued with us along with the common law of England. Under the constitution, the executive power of the state corresponds

to the king; the legislature corresponds to parliament; the judicial power is in the courts. In England the power of the king has been divided, a portion being delegated to parliament and a portion to the judiciary; but except as so delegated his power remains the same, and, in our government, has been transmitted to the executive.

But here lies the difference between the English system and our own: In England mandamus, being a high prerogative writ, issued in the king's name, and, consequently, could not run to him or to his derivatives, viz., parliament or the judiciary, except in the case of inferior courts. Surely, the governor possesses no such reserved power or high prerogatives as his Brittanic majesty. Our state government is one of limitations and not of grants. Does the New York court mean to assert that the governor possesses all power not delegated to the other branches of the state government?

Ed P. Smith, for respondent:

We have been unable to find any adjudicated case where the relator sought, as against the governor, the relief sought in this case. The provision of our constitution defining the three departments of government and denying to the members of one department the right to exercise any of the powers belonging to either of the others, is a familiar provision. It is to be found in the constitution of nearly all, if not all, the states of the union. Its interpretation has been the subject of much judicial investigation; and, upon the surface, there seems to be some conflict in the decisions. An examination of the cases, however, will show less division of opinion than might at first appear. The conflict arises over the nature of the act sought to be enforced. Where such act is what some of the courts are pleased to call ministerial and not executive in its character, some courts have asserted the right to issue the writ. But where the act is clearly an executive function, we think that the authorities are practically unanimous in holding that his action in the

premises can not be controlled by this court. It is not a lack of jurisdiction over the person that prevents the issuance of the writ, but it is a lack of power or jurisdiction over this officer. *Sutherland v. The Governor*, 29 Mich., 320.

The supreme court of Pennsylvania has construed constitutional provisions similar to our own:

"In the language of the constitution, article 4, section 2, 'The supreme executive power shall be vested in the governor, who shall take care that the laws be faithfully executed.' Also, same article, section 7: 'The governor shall be commander-in-chief of the army and navy of the commonwealth, and of the militia, except when they shall be called into the actual service of the United States.' He is also vested with the appointing and pardoning powers; the power to convene the legislature in cases of emergency and to approve or veto bills submitted to him by the general assembly. It is scarcely conceivable that a man could be more completely invested with the supreme power and dignity of a free people. Observe, the supreme executive power is vested in the governor and he is charged with the faithful execution of the laws, and for the accomplishment of this purpose he is made commander-in-chief of the army, navy and militia of the state. Who then shall assume the power of the people to call this magistrate to an account for that which he has done in discharge of his constitutional duties? If he is not the judge of when and how these duties are to be performed, who is? Where does the court of quarter sessions, or any other court, get the power to call this man before it, and compel him to answer for the manner in which he has discharged his constitutional functions as executor of the laws and commander-in-chief of the militia of the commonwealth? * * * If we once begin to shift the supreme executive power from him upon whom the constitution has conferred it to the judiciary, we may as well do the work thoroughly and constitute the courts the absolute guardians and directors of all governmental func-

tions whatever. If, however, this can not be done, we had better not take the first step in that direction. We had better at the outstart recognize the fact that the executive department is a co-ordinate branch of the government with power to judge what should or should not be done within its own department * * * and that with it, in the exercise of these constitutional powers, the courts have no more right to interfere than has the executive under like conditions to interfere with the courts." *Appeal of the Governor*,* 85 Pa., 433.

As to the immunity of the governor from coercion by courts see *Sutherland v. The Governor*, 29 Mich., 320; *State v. The Governor*, 25 N. J. Law, 331; *State v. Drew*, 17 Fla., 67; *State v. The Governor*, 39 Mo., 388; *People v. Bissell*, 19 Ill., 229; *People v. Cullom*, 100 Ill., 472; *Rice v. Austin*, 19 Minn., 103; *Miles v. Bradford*, 22 Md., 170; *Marbury v. Madison*, 1 Cranch [U. S.], 137; *Hawkins v. The Governor*, 1 Ark., 570; *State v. Warmoth*, 22 La. Ann., 1; *Bates v. Taylor*, 87 Tenn., 319, 332; *Dennett, Petitioner*, 32 Me., 508, 511; *State v. Lord*, 28 Ore., 489, 525; *Low v. Towns*, 8 Ga., 360, 372; *State v. Morton*, 156 N. Y., 141.

Frank N. Prout, Attorney General, for respondent:

The state constitution divides the government into three distinct departments and requires each department to act within its own sphere. The perpetuity of our free institutions depends upon a strict adherence to the essential mandate of the supreme law.

"The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as herein-

*The grand jury of Allegheny county subpoenaed John F. Hartmanft, governor, and Matthew S. Quay, secretary of state, to appear and give testimony in regard to the Pittsburg riots of July 21 and 22, 1877, which grew out of the strike of the trainmen. They refused to appear and pleaded their official privilege—state secrets.—REPORTER.

after expressly directed or permitted." Constitution, art. 2.

In 1867 an application was made by Robert J. Walker and one Sharkey, on behalf of the state of Mississippi, to the supreme court of the United States, for leave to file a bill against Andrew Johnson, president of the United States, and Edward O. C. Ord, military district commander, praying for a perpetual injunction restraining the enforcement of the Reconstruction Acts, on the ground that the same were unconstitutional and void. In delivering the opinion of the court, Chief Justice Chase said:

"An attempt on the part of the judicial department of the government to enforce the performance of such duties by the president might be justly characterized, in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance.' It is true that in the instance before us the interposition of the court is not sought to enforce action by the executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion." *State of Mississippi v. Johnson*, 4 Wall. [U. S.], 475, 499.

In our own state, the case of *State v. Holcomb*, 46 Nebr., 612, is not in point. In that case the action was not brought against the governor in that capacity.

The case of *State v. Elder*, 31 Nebr., 169, goes further toward supporting the doctrine that the judiciary can coerce other branches of government than any case I have been able to find, and it may not be out of place to state a few of the facts surrounding the decision of that case, which are now a part of the political history of the state. Benton and others claimed to have been elected to the executive department of the state. Elder was the speaker of the house of representatives. A majority of the joint convention of the legislature and the officers elect, were of a different political party from the contestants. Con-

tests had been instituted against the relator and evidence had been taken and filed. The legislature by resolution, in joint session, had directed the speaker not to open the returns of the election until after the hearing and determination of the contests then pending. Benton filed an application for a peremptory writ of mandamus to compel Elder, as speaker of the house of representatives, to open the returns and declare the result of the election in the presence of a majority of both houses of the legislature. This application, as is shown by the record, was filed January 8, 1891. The answer was filed, argument of counsel heard, and the case decided, and the writ was in the hands of the sheriff and was served on the respondent at 12:20 p. m. of the same day. These facts are recited simply to show the haste with which the cause was heard and determined. It was a time of intense excitement. In the corridors of the capitol building were members of the state militia, in full uniform, bearing the accoutrements of war. The doors of representative hall, where the joint convention of the legislature was held, were barred and guarded; so that, when the sheriff went to serve the writ he was obliged to force the door. No briefs were filed by counsel for either side. When we consider the brief time that was occupied from the filing of the application to the final determination of the case, it will be seen that there was but little time for consideration. Indeed in the state of intense excitement that then existed on all sides, it was necessary for the court to speedily determine the case. The reasoning in the case is not in harmony with a vast majority of the cases by other courts on the same subject; and with all due respect for the court as then constituted, we beg leave to suggest that the opinion in the *Elder Case* should not be followed or approved. But, in any event, it is distinguishable from the case at bar. The constitution enjoined upon the speaker a purely ministerial duty.

Oral argument by all counsel save *John F. Stout*.

Gurley for relator:

There are two jurisdictional propositions before the court: First, can the writ issue to the governor in any event? Second, if so, is this a proper case?

The authorities cited do not apply under our constitution. Our constitution does not create one executive department with the governor as its head. It creates several executive departments. The head of one of these is the governor. In this our constitution differs from the New York, New Jersey and Michigan constitutions. This court has set numerous precedents for the coercion of inferior executive officers.

Whether or not an act is ministerial is to be determined by the answer to the question, does it involve discretion? In the performance of this act the governor has no discretion as to whether or not the act shall be performed. I desire to cite *Martin v. Ingham*, 38 Kan., 641, not cited in brief.

Prout, Attorney General, for respondent:

This question is a broad one. Has the court a right to interfere with the executive department? The government is divided into three distinct, separate and independent departments. One can not interfere with the other except where there is express constitutional authority so to do. The very idea of mandamus implies a command by a superior to an inferior. Mandamus is a Latin term—we *command*. The constitution provides that the supreme executive authority shall be lodged in the governor and that he shall take care that the laws be faithfully executed. He is answerable only to a high court of impeachment, the sovereign people at the polls and his official conscience. The cases of mandamus to inferior executive boards and officials are not in point. The decisions in cases of this character are numerous. The supreme court of Indiana has held both ways. But now Indiana stands against executive coercion. No authority

holds that the governor can be coerced to do a political act. The line between ministerial and executive acts is as hard to describe as the distinction between animal and vegetable life. This distinction must be made by the court issuing the writ. When the power to coerce the executive is once conceded, and the tribunal is its own judge of the occasion, what escape is there from a judicial oligarchy by the evolution of time? I think the better reasoning is for the doctrine that the governor can not be coerced at all. How could a court enforce its order? A court should never make an order which it can not enforce.

Smith, for respondent:

The granting of the writ means that every district and county court from Deuel to Douglas can mandamus or enjoin the chief executive of the state. The spectacle is humiliating.

The respondent cited the following authorities:

The governor is himself a distinct and co-ordinate branch of the government and can not be coerced. *Sutherland v. The Governor*, 29 Mich., 320. All duties required of the governor are executive and political. *State v. The Governor*, 25 N. J. Law, 331. In his capacity as governor the chief executive can not be coerced. This can only be done when acting in an ex-officio capacity. *State v. Drew*, 17 Fla., 67. It does not follow because an act is ministerial that it is any the less executive. *State v. The Governor*, 39 Mo., 388. The performance of duty required by the constitution can not be coerced. In considering the case of *State v. Elder*, 31 Nebr., 169, the court is bound to take cognizance of historical facts: That order was made at a time when political feeling ran high in the state of Nebraska, and it is more than possible that the excited state of the public mind became known and felt in the inner chambers of the consultation room of this honorable court. We are safe in saying that no

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precedent for that writ can be found in any of the adjudicated cases reported in the books. We are safe in saying that that case was without precedent, and will never be a precedent.

Ransom, for relator:

This court is vested with jurisdiction to pass upon any question of law which may arise; else, in the words of von Holst, it would be a "travesty on justice." No halo of glory encircles the gubernatorial brow. If the governor does not obey, you can put him in jail. You can declare acts of the legislature unconstitutional. The two houses are not immune. Where came this gubernatorial immunity? Is the governor sovereign? No; it is his excellency, not his majesty. No man, no set of men are superior to the law, and of that law you are judges. The objection that the court can not enforce its order is puerile. As is said by Judge O'Brien, in the dissenting opinion in *People v. Morton*, 156 N. Y., 136, 137: "If the courts may be deterred from deciding what the law is in such cases, upon some remote possibility that executive power will resist the execution of the judgment, it would follow that a mandamus should never go against one possessing the physical or political power to resist its commands, but should be confined to those who are too weak to defy it."

SULLIVAN, C. J.

This is an application to this court in the exercise of its original jurisdiction for a writ of mandamus commanding respondent, as governor of the state, to appoint fire and police commissioners for the city of Omaha. In his answer to the alternative writ respondent denies the authority of the court to coerce executive action in any case. and alleges that by reason of the judgment in *State v. Moores*, 55 Nebr., 480, performance of the duty enjoined by the statute (sec. 167, ch. 12a, Compiled Statutes, 1901) would be necessarily barren of practical results. A com-

plete history of the litigation in which the present action had its origin will be found in some earlier opinions of this court (*Moore's Case, supra*; *State v. Kennedy*, 60 Nebr., 300; *Redell v. Moores*, 63 Nebr., 219) to which reference is made. It is conceded that the statute directs the governor, in imperative terms, to do just what the relator has requested him to do. "Immediately on the taking effect of this act, the governor shall appoint." This is the language of section 167; and it is therein further provided that "whenever a vacancy shall occur in any board of fire and police commissioners either by death, resignation, removal from the city or any other cause, the governor shall appoint a commissioner to fill such vacancy." It is also conceded that this is a constitutional and valid law, but it is claimed that authority to enforce it has not been committed to the judicial branch of the government. The argument is that the three departments into which all governmental powers are divided are co-ordinate; that each is entirely independent of the others, and that the issuance of a mandamus against the governor, in whom is vested the supreme executive power, is justifiable only on the theory that the executive department is inferior to the judicial department and that the right of command is given to one, and the duty of obedience imposed upon the other. This argument is certainly plausible, but whether it is sound is a point upon which the adjudged cases are in irreconcilable conflict. The right of the courts to determine all judicial questions, whenever and however they may arise, is given by the constitution in explicit terms and is indisputable; but equally clear and incontestable is the right of the executive officers named in the constitution to exercise all powers properly belonging to the executive department. There is an obvious logical difficulty in maintaining that two departments of government are of equal rank, and independent of each other, if one may command and the other must obey. A member of the executive department who performs an official duty in obedience to a writ of mandamus is a

passive instrument in the hands of the court; he is not in any proper sense an actor; he executes, not his own purpose, but a purpose originating in the judicial department of the government; he is in truth nothing more than the agency through which the court exercises an executive power. Considering the matter theoretically, and leaving practical results and past adjudications entirely out of view, it is hardly possible to escape the conclusion that the farthest limit of judicial authority in cases of this kind is to hear and determine; to give judgment establishing the relator's right, without issuing compulsory process to the respondent, whether he be the chief magistrate or some other member of the executive department. There seems to be no good reason for holding that one member of a co-ordinate branch of the government should be exempt from judicial control and the others subject to it. The principle of exemption from mandamus is grounded upon a distinct constitutional inhibition and does not at all depend upon official rank. Constitution, art. 2, sec. 1. As was said by Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch [U. S.], 137, "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined." Our own decisions make no distinction between the governor and the other officers of the executive department. Whether the writ should be granted or refused has been made in every case to depend upon the character of the act in question and not upon the office of the respondent. The argument that the judiciary in issuing a mandamus against a member of the executive branch of the government is thereby indirectly, and in violation of the constitution (art. 2, sec. 1), exercising a power properly belonging to the executive department, has never appealed convincingly to this court. In numerous cases the writ has gone against the auditor; and the right to issue it to any officer of the executive department, including the governor, is so thoroughly established by repeated

decisions that the question can be no longer regarded as open to discussion. All judicial controversies must end some time and this one seems to have run its course. It must be admitted that, according to the clear weight of authority, the chief executive can not, under any circumstances, be controlled by the writ of mandamus; but in this state, and in some other jurisdictions, a different rule prevails. The doctrine of this court is that when the law in positive terms enjoins upon the governor, or other officer of the executive department, a mere ministerial duty, leaving him no choice or discretion in regard to the matter,—no judgment to exercise as to whether he will or will not act,—the writ of mandamus may issue, and its issuance is an appropriate exercise of judicial power. In *State v. Thayer*, 31 Nebr., 82, a mandamus was issued against the governor and other executive officers, constituting the state board of canvassers, commanding them to canvass the votes cast for the relator as a candidate for judge of the sixth judicial district. In that case the court considered the authorities bearing upon the right of the judiciary to issue a coercive writ against the governor of a state, and reached the conclusion that the correct rule is that laid down in Maxwell's Pleading & Practice, page 735, in the following language: "There is a conflict in the authorities as to the right of a court to grant a mandamus against the governor of a state to compel the performance of a merely ministerial duty. That the courts have jurisdiction in such cases there seems to be no doubt. In a free government no officer is above the law, and should not be permitted to disregard it with impunity. No good reason can be given why a governor, whose duty it is to see that the laws are executed, should himself be permitted to set them at defiance." In *State v. Elder*, 31 Nebr., 169, which was an application for a mandamus to compel the speaker of the house of representatives to open and publish the returns of a general election, the court said, in an opinion allowing the writ, that the leading cases denying the authority of the courts to mandamus

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the governor of a state had been again examined and disapproved. In *State v. Boyd*, 36 Nebr., 60, the court took cognizance of an application for a mandamus to compel the governor to approve a bill of the State Journal Company for blanks and stationery. In *State v. Boyd*, 36 Nebr., 181, this court determined on the merits an application for a mandamus to compel Governor Boyd to issue a proclamation for the election of three additional members of congress. The writ was denied, not for want of jurisdiction, but because the right to apportion representatives among the states belongs exclusively to congress. *State v. Holcomb*, 46 Nebr., 88, was a case in which the court tried and determined a controversy involving the relator's right to a writ of mandamus commanding the governor to approve an official bond. It is true that in some of these cases the jurisdiction of the court was not challenged, but that circumstance is not important. In determining the cases on the merits the court necessarily decided in favor of its own jurisdiction. The authority of the courts in such cases does not, of course, depend upon the consent of the respondent. If jurisdiction exists it is given by law and does not rest upon mere official complaisance. *State v. Stone*, 120 Mo., 428. It seems to be conceded that the relator has a sufficient interest in the performance of the particular duty enjoined by the statute to entitle him to maintain this proceeding if the court has jurisdiction to entertain it. And it is evident that the refusal of the governor to discharge the duty of appointing fire and police commissioners for Omaha was not influenced in any degree by the character or quality of the act which the law, in imperative terms, directs him to perform. In other words, the position taken by respondent is not defended on the ground that the appointment of commissioners would not be the performance of a ministerial duty. The defense rests upon broader ground; it is that there is no authority in the court to coerce the governor, in any case, or under any circumstances, to exercise an executive power. The conclusion

to which we are compelled by our own decisions is that we have, not only jurisdiction to decide the controversy, but authority to issue the peremptory writ to enforce our decision. Whether the peremptory writ should actually issue in a case of this kind is a question of great delicacy and one which we do not here decide. Speaking of the cases in which the power of the courts to mandamus the governor is asserted, Mr. Freeman says in the note to *Greenwood v. Routt*, 31 Am. St. Rep. [Colo.], 284: "While it must be admitted that these cases by no means constitute the majority of those bearing upon the subject, yet they seem to us to be based upon the better reasoning, and more in accord with what has been the long adopted policy of the highest judicial tribunal in the land, the supreme court of the United States." Nothing further need, we think, be said on the question of jurisdiction.

The second proposition discussed by counsel was decided in the *Kennedy Case*, and was, we think, decided rightly. The doctrine of *res judicata* is that a question once determined by a judgment on the merits is forever settled, so far as the litigants and those in privity with them are concerned. The question decided is, while the decision stands, a sealed and closed question; the final judgment, sentence, or decree fixing the rights of the parties ends the controversy, and is in any future litigation conclusive evidence of those rights. Counsel for relator concede the general rule as to the conclusiveness of judgments, but insist that it has no application to a case in which a sovereign state is seeking to enforce obedience to its laws. In other words, counsel contend that the state, being vested with absolute power to govern society, and having supreme authority to make and administer laws, is not bound by an adverse adjudication in a matter pertaining to its sovereignty. "If such were the rule," said Mr. Justice Story in *Gelston v. Hoyt*, 3 Wheaton [U. S.], 246, 317, "it would be a perfect anomaly in the law and utterly subversive of the first principles of reciprocal justice." The fundamental conception of a judgment is

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a judicial decision binding upon all the parties to the controversy. As defined by our own statute (sec. 428, Code of Civil Procedure) it "is the final determination of the rights of the parties in an action." By this statute the state has declared the legal effect and consequence of a judgment; it has said that, as between the parties, the judgment shall end the controversy and end it forever. The state, in the exercise of its governmental functions, is not obliged to invoke the aid of the courts in any case; but when it does so it assumes the character of an ordinary suitor, and is bound by self-imposed restraints; it claims no advantage over its adversary, and, though one is a sovereign and the other a citizen, they stand equal before the law. This is a just principle, and in it we see no serious danger to the public weal. It was recognized and enforced in England without judicial dissent as far back as the *Duchess of Kingston's Case*, 20 State Trials, 355. And in the highest court of this country it was early held, by the unanimous opinion of the judges, that the government was conclusively bound by a decision rendered against it in its sovereign character. *Gelston v. Hoyt*, *supra*. When a state brings an action for the enforcement of its criminal or revenue laws, it acts, of course, in its governmental capacity, but it is bound, nevertheless, by an adverse decision. The question decided can not be again litigated between the same parties, either in a civil or criminal case. *Coffey v. United States*, 116 U. S., 436; *New Orleans v. Citizens' Bank*, 167 U. S., 371. Notwithstanding what has been said by counsel for relator, we are still of opinion that *Holsworth v. O'Chander*, 49 Nebr., 42; *O'Connell v. Chicago T. R. Co.*, 184 Ill., 308, and *People v. Smith*, 93 Cal., 490, are direct authority upon the point we are now considering. In each of these cases the state was asserting a right on behalf of the general public; it was endeavoring as a sovereign power, to execute a public law; it was not seeking to recover or establish title to corporate property; and yet it was held to be concluded by the former adjudication, not on the untenable theory

that it was a party to the litigation only in its corporate capacity, but because the decision was, in accordance with the general rule, indisputable evidence of the rights of the litigants. *McClesky v. State*, 4 Tex. Civ. App., 322, is also directly in point. In that case the state was surely acting in its governmental capacity; it was seeking to prevent the usurpation of a franchise, and to oust the defendants from holding and exercising offices that had no legal existence; it was endeavoring, as the relator in this case is, to put the administration of public affairs in the hands of the duly constituted agents of the public.

The right of the state to oust the present members of the board of fire and police commissioners of the city of Omaha has been once tried and determined, and, under existing conditions, the judgment rendered is an effective bar to another suit for the same purpose. The right of the mayor's appointees to hold the offices was the thing adjudged in *State v. Moores*, and it is the only thing to be adjudged in this action. The decision in the *Moores Case* is not law, but for the purposes of this litigation it stands in place of the law. The governor may, of course, appoint, but in the face of a plea of *res judicata* we can not put his appointees in possession of the offices. The court is held in bondage by its own error. *Stat pro ratione voluntas* is the rule of decision for this case.

The writ is denied.

WRIT DENIED.

SEDGWICK, J.

I concur in the conclusion that this court has jurisdiction of the action but do not express any opinion on the question of *res judicata*.

HOLCOMB, J., concurring.

I concur in the point stated in the 6th paragraph of the syllabus and what is said in the opinion with respect thereto. Further than that I express no opinion on the subject of the jurisdiction and authority of the court to coerce by mandamus the chief executive of the state.

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On the question of the doctrine of *res judicata* as held and applied in this case I concur in all that is said and decided in the opinion.

The following opinion on rehearing was filed July 22, 1902:

1. **Abstract Questions of Law: SUBJECT OF LITIGATION: REAL PARTIES: RES IN DISPUTE: RES JUDICATA.** Abstract questions of law can not be made the subject of litigation. There must be real parties, and a *res* in dispute that will become *res judicata* when the litigation is determined.
2. **Former Determination: FIRE AND POLICE COMMISSIONERS: APPOINTMENT BY MAYOR AND COUNCIL: GOVERNOR.** The former determination of this court that certain parties were entitled to hold the office of fire and police commissioners of the city of Omaha, under the appointment of the mayor and council of the city, is not binding on the governor, so as to prevent his appointment of commissioners under the provisions of the act for the incorporation of metropolitan cities.
3. **Right of Parties: RES JUDICATA.** The right of the parties in that litigation to the term in dispute therein is *res judicata*, but the principle of law announced, having been found erroneous and overruled, will not be followed.

SEDGWICK, J.

After the former opinion in this case the relator filed what is by him denominated a motion for a new trial. This being an original action in this court, relator assumed that he was entitled to use this form of motion. After argument the court announced to the parties that the motion would be treated as a motion for a rehearing under rule 7, and not as a motion for a new trial. The reason for this view is that a new trial is a reconsideration of an issue of fact (Code of Civil Procedure, sec. 314), and in this case no evidence was taken and no issue of fact was presented. The sole office of the motion is to point out errors in the former opinion of the court. This is the province of a motion for rehearing. *First Nat. Bank v. Yocum*, 12 Nebr., 208. The court, after argument, being desirous of further considering the question presented, both parties were allowed time to file further briefs, and

the case was submitted as upon argument after rehearing had been allowed.

The power of the legislature to impose upon the governor the duty of appointing the board of fire and police commissioners for the city of Omaha was declared in *Redell v. Moores*, 63 Nebr., 219, overruling *State v. Moores*, 55 Nebr., 480, 41 L. R. A., 624. This question has not been discussed in the present proceeding, both parties regarding the matter as settled. Upon the former hearing there was much discussion upon the question whether the general rule as to the conclusiveness of judgments can be applied to sovereign states while acting in governmental capacity, and in the opinion (*State v. Savage*, ante, p. 684) it is said: "The state, in the exercise of its governmental functions, is not obliged to invoke the aid of the courts in any case; but when it does so it assumes the character of an ordinary suitor, and is bound by self-imposed restraints; it claims no advantage over its adversary, and, though one is a sovereign, and the other a citizen, they stand equal before the law." Upon the present hearing, the application of the rule in this case has been much discussed. The doctrine of *res judicata* requires that when a thing is determined by a court of competent jurisdiction the parties to that litigation shall not be allowed in any other case to retry the matter. The rule is of universal application. No proper party to litigation, whether sovereign or subject, is exempt from its control. To apply the rule it is necessary first to ascertain what issue was determined in the former litigation. It is said by respondent's attorneys in their brief:

"In the *Moores Case* the parties based their respective claims wholly upon the source from which they were derived. There was no common source. They claimed through entirely different sources. While the immediate question was the right to the offices for a limited term, a determination of that question necessarily involved a determination as to the location of the appointing power. A determination of that question was necessary, impera-

tive and unavoidable. A decision of the case could not be reached without first deciding that question. When that was determined the whole case was determined. That was the only question debated or decided. In whom was the appointing power, in the governor or the mayor? That was the only question submitted to the court, and the only question argued or decided."

This is a very plausible statement of the point insisted upon; but is it entirely sound? It was undoubtedly necessary to "determine the location of the appointing power" but was that the thing (*res*) in litigation, the substantive matter that the respective parties were contending for? Or was it a proposition of law called in to assist in determining the right of the respective parties to the thing in controversy?

That action was begun on the relation of the attorney general against J. H. Peabody et al., who were appointed by the governor. They answered, setting up their appointments as members of the board of fire and police commissioners for the city of Omaha. Peter W. Birkhauser et al., upon their application, were allowed to intervene, setting up their right to the office by virtue of an appointment from the mayor and council of the city. Each party demurred to the pleadings of the other, and the question presented was, which party, under the law, is entitled to hold the office,—the respondents for the term for which they had been appointed by the governor, or the interveners for the term for which they had been appointed by the mayor and council?

The object of the attorney general undoubtedly was to obtain from this court a construction of the law; that is, to ascertain whether, under the law, the governor should appoint, or the duty devolve upon the city authorities. That was the question argued by counsel, and discussed and decided by the court; but was it, in the legal sense, the subject-matter of the litigation? It seems clearly not. If the question had been presented to the court as the thing to be litigated, it would not have entertained it.

The relator would have been told that this was not a moot court. Abstract questions of law can not be made the subject of litigation. There must be real parties, and a *res* in dispute that will become *res judicata* when the litigation is ended. In the *Moore's Case* the thing in dispute was the office itself, and it was determined that the interveners were entitled to the office for the term of their appointment, and respondents were ousted. This is *res judicata*. And in *State v. Kennedy*, 60 Nebr., 300, some of the respondents were still holding the terms adjudicated in the former case, and the doctrine of *res judicata* was applied.

In the determination of a case legal principles are invoked, and the conclusion of the court thereon announced. Whether such conclusions shall be followed, without further investigation, in subsequent litigation, frequently depends upon the principles of *stare decisis*. When such conclusion becomes a rule of property, it is adhered to until changed by statute; but when no rule of property is established, it is the duty of the court to re-examine and overrule its former decision when shown to be fundamentally wrong. *State v. Hill*, 47 Nebr., 456. The thing determined by the litigation becomes *res judicata*, and can not be afterwards questioned between the parties, although the rule of law by which the decision was controlled is afterwards found to have been incorrectly applied, and such application is no longer binding upon the court. The former is *res judicata*, and the latter is to be measured by the principles of *stare decisis*.

It being conceded that no legal appointments have been made, and that there are no legal incumbents of the office, and that the law requires the governor to make the appointments, it is manifest that he is not prevented from so doing by an erroneous determination of the right of certain parties to a prior and different term. We conclude, therefore, that it is now the duty of the respondent to appoint a board of fire-and-police commissioners for the city of Omaha under the statute in question.

The majority of the court is satisfied with the decision in *Redell v. Moores, supra*, but as it is not questioned in this proceeding, the writer has made no investigation of the questions therein discussed.

In the former opinion in this case it was said: "Whether the peremptory writ should actually issue in a case of this kind is a question of great delicacy, and one which we do not here decide." There has been no further discussion of that question by counsel, and we do not feel called upon now to determine or further consider it. It is not to be supposed that the peremptory writ will be necessary.

The judgment entered in this case is modified in accordance with this opinion.

JUDGMENT ACCORDINGLY.

HOLCOMB, J.

I am not prepared to express an opinion different from the one heretofore concurred in by me.

NOTE.—*Mandamus*.—*Governor*.—*Political Power*.—*Ministerial Act*.—*Patent to Public Land*.—The action of a governor in the exercise of his political or executive functions, whether conferred by the constitution or by statute, can not be controlled by mandamus. *Greenwood v. Routt*, 17 Colo., 156.

If in the exercise of some power, neither political nor essentially pertaining to government, the law specially enjoins upon the governor the performance of some particular act under circumstances in which he has no discretion, and he refuses to perform the act, and by his refusal a party is deprived of his property or other legal right, the injured party may have relief by mandamus against the governor, if there is no plain, speedy and adequate remedy in the ordinary course of law. *Greenwood v. Routt*, 17 Colo., 156.

Where public land has been regularly sold by the state land board, the purchaser or his assignee in good faith, is entitled to a patent therefor to be signed by the governor and otherwise attested as the law directs, whenever such purchaser or his bona-fide assignee has paid or tendered the full purchase price with lawful interest as the law provides, and has otherwise complied with the conditions of the purchase; and under such circumstances mandamus is an appropriate remedy in case of a refusal to execute and deliver a patent. *Greenwood v. Routt*, 17 Colo., 156.

Where the governor recognizes an act as legal and is proceeding

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to execute its provisions, the courts can not directly interfere with the discharge of his duties and restrain him from executing the law, merely because it is alleged the law is unconstitutional. *Frost v. Thomas*, 26 Colo., 222. Campbell, C. J., dissenting.

Our state government is divided into three co-ordinate branches—executive, legislative and judicial—each of which, by the constitution, has its powers limited and defined. They are of equal dignity and within their respective spheres, equally independent. *Frost v. Thomas*, 26 Colo., 222, 223.

The act of the legislature in question in *Frost v. Thomas*, was the creation by the legislature of the new county of Teller. It was claimed that the law creating the county was unconstitutional. Chief Justice Campbell's dissent was based on his claim that *Frost v. Thomas* overruled the doctrine laid down in *Greenwood v. Routt*.

In 1859, Willis Lago, a free negro, was indicted for assisting a slave to escape from her owner. Lago afterwards fled to the state of Ohio. Governor Magoffin of Kentucky demanded his rendition from Governor Dennison of Ohio. The latter submitted the question to Wolcott, attorney general of the state, who advised that the requisition be dishonored because the offense charged was neither treason, felony nor a crime *malum in se*; that it was an offense unknown to the law of Ohio, and also not described as a crime by the statute of Kentucky. An application for a writ of mandamus was made to the supreme court of the United States. Taney, C. J., delivered the opinion, which was to the effect following, viz.: (1) The court had jurisdiction by virtue of the constitution, without any act of congress; (2) a suit by or against a governor is a suit by or against a state (see *State v. Chicago, R. I. & P. R. Co.*, 61 Nebr., 545, 62 Nebr., 123); (3) mandamus did not issue by any prerogative power, but in modern practice was an ordinary suit at law; (4) the words "treason, felony or other crime" (U. S. Constitution, art. 4, sec. 2, clause 2) meant every offense made punishable by the laws of the extraditing state; (5) it was the duty of the governor of Ohio to surrender Lago on demand of the governor of Kentucky; (6) the duty of the governor in the premises was merely ministerial; (7) but in a case of this kind the governor could not be coerced by the judiciary, not even by virtue of an act of congress. *Kentucky v. Dennison*, 24 How. [U. S.], 66.

Nebraska.—Mandamus can not be invoked to determine a title to an office. *Anderson v. Colson*, 1 Nebr., 172. Mandamus can not be invoked to compel commissioners of public lands and buildings to issue warrant to subcontractor for the erection of a public building. *People v. Butler*, 2 Nebr., 5. Mandamus is a proper remedy to compel a sheriff to appoint appraisers under the exemption law. *People v. McClay*, 2 Nebr., 7. The application and the answer are the only pleadings known to mandamus. When a demurrer is filed and overruled, the writ issues as of course. *People v. Hamilton County*, 3 Nebr., 244. Mandamus will not lie to compel county commissioners to adopt certain plans and specifications accompanying a bid. *People v. Commissioners of Buffalo County*, 4 Nebr., 150, 161. Mandamus

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will lie to compel a justice of the peace to hold his office in the precinct from which he is elected, and any citizen thereof may maintain the action. *State v. Shropshire*, 4 Nebr., 411. Mandamus does not lie to compel a school treasurer to pay money to another district treasurer, unless the demand is accompanied by an order properly countersigned. *People v. Hodge*, 4 Nebr., 265. Mandamus does not lie for the removal of a county seat, where it appears that fraudulent votes cast in favor of the new location were sufficient to change the result. *State v. Thatch*, 5 Nebr., 94. Mandamus lies to compel county commissioners to levy tax for payment of judgment. *State v. Buffalo County*, 6 Nebr., 454. Mandamus lies to compel the delivery of state property unlawfully held. *State v. Bacon*, 6 Nebr., 286. The application must show prior demand and refusal and a duty imposed by law. *Kemerer v. State*, 7 Nebr., 130. An alternative writ must contain a statement of all necessary facts. *State v. School District*, 8 Nebr., 92. Writ never granted in anticipation of omission of duty. *Idem*. Verification should be absolute even in an ex parte proceeding. *State v. School Districts*, 8 Nebr., 98. A stockholder of a corporation may compel its officers, by mandamus to make and publish the statement required by statute. *Smith v. Steele*, 8 Nebr., 115. In an application for mandamus to compel the payment of bonds, the general allegation that they were issued "for works of internal improvement" is insufficient. *State v. Thorne*, 9 Nebr., 458. A sheriff or constable who refuses to deliver property to the party entitled thereto can be coerced by mandamus. *State v. Cunningham*, 9 Nebr., 146. Mandamus does not lie to compel a sheriff to deliver property upon a judgment in a trial of right of property. *State v. Gillespie*, 9 Nebr., 505. What petition must show. *State v. Otoe County*, 10 Nebr., 19. Will not lie to compel commissioners to levy a tax to pay judgment of U. S. court on precinct bonds. *State v. Dodge County*, 10 Nebr., 20. Alternative writ will not issue unless relator is clearly entitled to relief. *State v. Helmer*, 10 Nebr., 25. Mandamus is invoked merely to compel action; it creates no new powers and is not a proceeding to correct errors. *State v. Nemaha County*, 10 Nebr., 32. Error can not be reviewed in an application for mandamus. *State v. Poccell*, 10 Nebr., 48. Clerk may be mandamus to canvass a vote. *State v. Hill*, 10 Nebr., 58. Mandamus can not be substituted for quo warranto. *State v. Palmer*, 10 Nebr., 203. The writ will not issue to compel commissioners to audit account. *State v. Furnas County*, 10 Nebr., 361. The writ will not issue to coerce the payment of a judgment against a county pending garnishment proceedings. *State v. Otoe*, 10 Nebr., 384. A district judge can not grant the writ in vacation. *State v. Pierce County*, 10 Nebr., 476. Any citizen may enforce a matter of public right by mandamus. *State v. Stearns*, 11 Nebr., 104, 106. Writ will issue to compel payment of county warrants. *State v. Gandy*, 12 Nebr., 232. Writ granted to compel clerk to account for fees. *State v. Whittemore*, 12 Nebr., 252. Writ will not issue to compel the release of exempt property. *State v. Sanford*, 12 Nebr., 425. Mandamus is an action at law not reviewable on appeal—in the statutory sense of that word. *State v. Lancaster County*, 13 Nebr., 223. Writ

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will not issue to compel action by county commissioners, in the case stated [basis to levy and estimate]. *Lancaster County v. State*, 13 Nebr., 523. Application must show that relator is entitled to the writ. *State v. Wallichs*, 13 Nebr., 278. Writ will issue against county commissioners to include in estimate sufficient, within legal limit, to cover claims. *State v. Gosper County*, 14 Nebr., 22. Writ issues only when relator has clear right, and no remedy in ordinary course of law. *State v. Omaha*, 14 Nebr., 265. Application for writ compelling removal to new county seat; answer of fraud and illegal voting, without statement of facts. *Hunter v. State*, 14 Nebr., 506. Board of equalization can be compelled to act by mandamus—dictum. *Sumner v. County of Colfax*, 14 Nebr., 524, 525. Lies only to control purely ministerial acts. *State v. Kendall*, 15 Nebr., 262. Lies to compel canvassing board to reassemble and complete canvass of election. *State v. Peacock*, 15 Nebr., 442. Writ will issue to compel a district judge to sign bill of exceptions after expiration of his term of office. *State v. Barnes*, 16 Nebr., 37. Demurrer lies to alternative writ; if overruled, respondent has right to answer. *Long v. State*, 17 Nebr., 60. In absence of affidavit on which writ issued at nisi prius, the allegation of citizenship will be presumed. *Long v. State*, 17 Nebr., 60, 62. Writ lies to compel clerk to canvass returns of election. *Long v. State*, 17 Nebr., 60, 61. Application for writ against sole incumbent, will abate with his tenor, except the incumbent resign to avoid the writ. *State v. Guthrie*, 17 Nebr., 113. Writ lies to compel telephone company to furnish instruments. *Webster Telephone Case*, 17 Nebr., 126. Writ will not lie, at instance of taxpayer, to compel clerk to report fees, unless board refuses to act. *State v. Sovereign*, 17 Nebr., 173. Writ does not lie to compel issuance of execution when a defective stay bond has been amended correctly. *State v. Russell*, 17 Nebr., 201. Writ will lie to compel performance of ministerial duties. *State v. Cummings*, 17 Nebr., 311. To compel marshal in city of first class to report names of all engaged in liquor traffic. *State v. Cummings*, 17 Nebr., 311. Alternative writ may be canceled by court. *State v. Matley*, 17 Nebr., 564. Writ will not lie to compel the acceptance of highest bid for leasing of school lands, unless there is an abuse of discretion. *State v. Scott*, 17 Nebr., 686. Writ lies to compel county board to act on complaint against county officer. *State v. Saline County*, 18 Nebr., 422. Writ lies to compel license board to appoint day for hearing remonstrance. *State v. Reynolds*, 18 Nebr., 431. Court will not determine constitutionality of election law, on application for writ to call an election. *State v. Douglas County*, 18 Nebr., 506. Writ does not lie to compel board of educational lands and funds to award lease. *State v. Scott*, 18 Nebr., 597. Writ lies to compel school officers to allow children to attend school in district to which land of parents has been attached by order of county superintendent. *State v. Palmer*, 18 Nebr., 644. Writ does not lie to fix supersedeas bond in case stated. *State v. Judges*, 19 Nebr., 149. Writ lies to compel issuance of order of sale. *State v. Thiele*, 19 Nebr., 220. Writ lies to compel certification of bonds legally issued. *State v. Babcock*, 19 Nebr., 230. Writ lies to compel letting of contract

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for county supplies to the lowest bidder. *State v. Saline County*, 19 Nebr., 253. Writ does not lie where county board rejects all bids. *State v. Saline County*, 19 Nebr., 253. Writ lies to compel officer removed to surrender his office. *State v. Mecker*, 19 Nebr., 444. Writ does not lie to compel change in location of railway station until action of railway commission. *State v. Chicago, St. P. M. & O. R. Co.*, 19 Nebr., 476. Writ can only enforce a duty enjoined by law. *Thatcher v. Adams County*, 19 Nebr., 485. Writ lies to restrain collection of taxes unauthorized. *Thatcher v. Adams County*, 19 Nebr., 485. Writ lies to compel payment of school district orders. *State v. Bloom*, 19 Nebr., 562, 565. The foregoing citations are not all the cases of mandamus in volumes 1-19, but they are believed to cover all important questions peculiar to mandamus therein reported.

The following important decision rendered by the attorney general's office can not fail to be of interest: "The legal voters of a rural school district may be compelled by mandamus to vote revenue for school purposes, and a parent or guardian or the county superintendent may apply for such writ." Report for biennium ending November 30, 1902, pp. 247-251, Frank N. Prout, Attorney General.—REPORTER.

DANIEL W. ILER V. CHARLES ROSS ET AL.

FILED MAY 21, 1902. No. 12,327.

1. **Metropolitan Cities: CHARTER: ORDINANCE: SANITARY REGULATIONS: LICENSE.** Under the provisions of the charter act governing cities of the metropolitan class, the authorities thereof, for the purpose of protecting and preserving the public health, comfort and welfare, are empowered to enact by ordinance all necessary and reasonable regulations for the collection and removal of all garbage, filth and other noxious and unwholesome substances, ashes, stable manure, rubbish, and other waste and refuse matter accumulating in centres of population, and which, without such regulations, would become nuisances, menacing to the comfort and health of the inhabitants of such cities, and to license persons engaged in such occupation or business.
2. **Exclusive Privilege by Contract.** Such cities may also, as incident to the power of regulation, grant an exclusive privilege by contract to one person to collect and remove under its own immediate direction and control and in pursuance of regulations enacted for that purpose, those noxious and unwholesome substances which are nuisances *per se*, and a menace to the public health.
3. **Legislature: GUISE OF POLICE REGULATION: ARBITRARY INVASION OF PRIVATE PROPERTY.** The legislature can not, under the guise

of police regulation, arbitrarily invade private property or personal rights. The test when such regulations are called in question is whether they have some relation to the public health or public welfare, and whether such is, in fact, the end sought to be attained. *Smiley v. MacDonald*, 42 Nebr., 5.

4. **Police Regulation: MONOPOLY: CITY.** It is not competent for the city, as a police regulation, to grant a monopoly to one individual, by contract, to enter upon the private premises of the inhabitants of the city, and at their expense collect and remove those innoxious substances, such as ashes, cinders, stable manure, or other substances not in themselves nuisances, but which if allowed to accumulate in unreasonable quantities would become such or which may be utilized for some beneficial purpose. Such an attempted exercise of power is in excess of the authority granted by the charter, an invasion of the personal and property rights of the citizens, in restraint of trade, and unnecessarily creates a monopoly.
5. **Void Ordinance.** The section of the ordinance of the city of Omaha under consideration, *held* void and unenforceable because an attempted exercise of power in excess of the authority conferred by the charter governing such city.

ERROR from the district court for Douglas county.
Tried below before DICKINSON, J. *Affirmed.*

W. J. Connell and W. H. Thompson, for plaintiff in error.

I. J. Dunn, contra.

HOLCOMB, J.

The defendants in error, relators in the court below, sued out a writ of habeas corpus for the purpose of regaining their liberty from imprisonment in the city jail, where they were committed for the alleged violation of one of the ordinances of the city of Omaha; it being alleged as a ground for the issuance of the writ and contended at the trial that the section of the ordinance authorizing their conviction and imprisonment was null and void, and their detention, therefore, unlawful. A trial in the district court resulted in a judgment holding the section of the city ordinance under which the conviction was had void, and discharging the relators from custody. The respondent, as custodian of the prisoners under the

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commitment issued on conviction in the criminal trial, prosecutes error proceedings in this court for the purpose of obtaining a reversal of the judgment discharging the relators from custody.

The question determined in the lower court, and the only one of a substantial character involved in the controversy, is with relation to the validity of an ordinance numbered 4462, of the city of Omaha, entitled "An ordinance regulating the collection and removal of dead animals, garbage, manure, ashes, filth, offal, night soil and other refuse matter, providing penalties for the violation of the provisions hereof, and repealing ordinances numbered 3735, 3869, 4008, and 4080." Section 1 of said ordinance, which is the one directly bearing on the subject, and which it is contended is void, provides that any person who shall collect or remove any dead animals, garbage, ashes, filth, offal, night soil or other refuse matter within the corporate limits of the city of Omaha, not having a contract with said city so to do, shall be deemed guilty of misdemeanor and upon conviction thereof shall be fined in any sum not less than \$5 nor more than \$20. The relators were charged and convicted of unlawfully collecting and removing garbage, ashes, filth and other refuse matter without having a contract with the city, contrary to the provisions of said section 1. The object of the ordinance, which is rendered obvious from a reading of the whole of it, is to empower the city to enter into an exclusive contract with some individual, association or corporation to collect and remove within the corporate limits of the city all of the substances, materials and objects mentioned in section 1, which, if allowed to accumulate in a city, would become a nuisance; to provide maximum charges therefor, to be paid by the owner or occupant of the premises from which removed; to regulate the collection and removal; and to punish any one engaging in such business without having a contract with the city therefor.

If the city is empowered to enact an ordinance provid-

ing that a contract shall first be entered into with it before any person is authorized to do any of the things prohibited, it follows as a legal sequence that the city may grant an exclusive right to one individual with whom it may enter into a contract and refuse to contract with all others; that is, if it is authorized to contract at all, it may lawfully contract with one or more, as may best suit its own views as to the propriety, necessity and terms upon which it will enter into such contractual relation with another. Over the objections of the city, and for the purpose of showing the city was incapacitated from contracting with the relators, there was offered at the trial of the cause in the court below and received in evidence a contract with one McDonald, giving to him the exclusive right to collect and remove within the corporate limits all of the things mentioned in section 1 of the ordinance. Aside, however, from this evidence, we regard it as altogether clear that, if the section of the ordinance mentioned is sustained as valid, it must be done on the theory that the city may lawfully provide by exclusive contract for one contractor alone to engage in the business of collecting and removing the garbage and other waste matter mentioned in the ordinance, and to exclude all others from such business by suitable penalties for a violation of the provisions of the act. In fact, counsel for plaintiff in error fairly and frankly meets the issue by asserting in his brief: "The right to grant an exclusive contract and privilege, which necessarily includes the right to deny the privilege to another, has been fully settled by the decisions of this court." The issue is thus directly presented as to the validity of the section of the ordinance under the provisions of which the relators were arrested, tried, convicted, and sentenced to imprisonment for its violation, the relators contending that such ordinance is void, as being an unwarranted invasion of private property rights in restraint of trade, creating a monopoly, and contrary to a sound public policy; while respondents maintain that it is a lawful exercise of the police powers invested in the

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city by its charter for the protection of the health of the inhabitants of the city, and to preserve and promote the public comfort and welfare.

This is the only issue adjudicated in the trial court, and as it involves the substantial merits of the controversy, and goes to the very core of the subject of the litigation, we are disposed to confine ourselves in the consideration of the cause to this question alone, to the exclusion of all collateral matters. The only exception contained in section 1 as to the right of any person save the contractor therein provided for to remove any of the substances spoken of, is a proviso that the act shall not apply to anyone hauling their own stable manure from their own premises with their own team or teams, and also a proviso regarding the use of manure for lawns, gardens, etc., under certain regulations, not necessary to mention. By section 11 the word "garbage," as used in the act, is defined to mean all refuse matter, animal or vegetable. It will thus be observed that the act is most sweeping in its character, and in effect, if valid, prohibits any resident of the city himself, or by the employment of another, from undertaking the collection or removal of any or either of the substances mentioned from his own premises, save the one exception noted as to the removal of stable manure by the owner or occupant from his own premises with his own team. All waste material, all accumulation of rubbish of whatsoever character, which, in time, if allowed to accumulate in large quantities, would doubtless become a nuisance, to abate which the city might employ any lawful means, can be collected and removed only by the contractor of the city at the expense of the private owner or occupant of the premises, at charges not exceeding the maximum rate allowed by the ordinance. Can such sweeping powers be justified as a valid exercise of the police powers of the city under its charter authority? By section 54 of the city charter act, the corporation is empowered "to make and enforce all police regulations for the good government, general welfare, health, safety

and security of the city and the citizens thereof in addition to the police powers expressly granted herein and in the exercise of the police power may pass all needful and proper ordinances" (Compiled Statutes, ch. 12a), with provisions for penalties for violations of ordinances enacted under the provisions of said section. The right of a city, under charter acts such as the one we have quoted, to make all needful rules and regulations for the proper collection and removal of all forms of rubbish, waste and other refuse matter constantly accumulating in cities and towns, where the population is centred in a small territory, in order to protect the health of the inhabitants and preserve the public welfare, to provide the manner, method of collecting such material, and character of the vehicles in which the same shall be removed, and the place of depositing such refuse matter so as not to endanger the public health, and to license those engaging in such industry or business, seems so plain a proposition as to scarcely require elucidation or discussion, and is one on which the text writers and the utterances of all the courts are in entire harmony. Such regulation was clearly contemplated by the legislature in the enactment of the statute quoted from, and to that extent, at least, there is left no room for doubt or difference of opinion. *People v. Gordon*, 45 N. W. Rep. [Mich.], 658; *City of Ouray v. Corson*, 59 Pac. Rep. [Colo. App.], 876; *In re Vandine*, 6 Pick. [Mass.], 187; *Boehm v. City of Baltimore*, 61 Md., 259. In the last case cited it is said in the opinion: "The validity of these ordinances was not seriously questioned in argument. That they are a lawful and proper exercise of the power 'to preserve the health of the city and to prevent and remove nuisances,' does not admit of doubt. Such powers have been universally granted to municipal corporations in this country. In fact the preservation of the health and safety of the inhabitants is one of the chief purposes of local government, and reasonable by-laws, in relation thereto have always been sustained in England, as within the incidental authority of

such corporations." In this jurisdiction we are committed to the doctrine, from which we do not believe it wise to recede, although the authorities are divided, that as to those substances which are in themselves nuisances, and for the protection of the public health require speedy and prompt abatement and removal by the city, or some one by it authorized to perform the work, the exercise of the power is in its nature a public function, to be engaged in by the city in its own behalf or by the employment of such agencies as will best accomplish the desired result, and that regarding such matters the granting of an exclusive privilege by the city to one individual for the removal of such unwholesome substances is not an unlawful exercise of power, nor does it conflict with the principle of law opposed to the creation of monopolies or an invasion of personal rights. The power thus exercised is incidental to the right to prevent and abate nuisances for the better protection of the health of the inhabitants of the city, and to accomplish the desired result the corporation may adopt the method of acting through its own agencies, or one of its own choosing, and directly under its own direction and control. *Smiley v. MacDonald*, 42 Nebr., 5, is relied on by the city in the case at bar to sustain the ordinance under consideration. In that case, after quoting from the charter provisions as then existing, which it is to be noted are materially different from those of the present charter, it is said in the opinion, page 13: "It requires no argument to prove that the subject of the contract before us is within the strict letter of these provisions of the charter. * * * But the removal of the noxious and unwholesome matter mentioned in the contract tends directly to promote the public health, comfort, and welfare and is therefore a proper exercise of the police power." It is further held in the opinion that the fact of conferring an exclusive privilege was, as the case was presented, immaterial; that the power conferred by the charter on the city implied the right of the city to determine the means and agen-

cies best adapted to the end in view. The ordinance then under consideration was not by any means of such sweeping character as the one under consideration in the present case. Many rights there reserved to the property owner and occupant as to the disposition of rubbish, debris, and other waste material are by the latter ordinance entirely swept away. As that case was presented and determined, we think it goes no further than to hold that the noxious and unwholesome substances such as dead animals not killed for food, garbage in the strict sense of the word, and probably other substances which are nuisances *per se*, might lawfully be removed by the city, in its exercise of lawful authority, for the protection and preservation of the health, comfort and welfare of the inhabitants, or the same end might be accomplished by creating an exclusive agency under the direct control of its own officers to perform the work necessary for such result. This is also the extent of the decision in the Michigan supreme court in the case of *City of Grand Rapids v. De Vries*, 82 N. W. Rep. [Mich.], 269; also relied on in support of the contention of the respondent. In the case last cited was involved the question of the authority of the city, in the exercise of its police powers, to grant an exclusive license for the removal of garbage only. Under the ordinance then under consideration "garbage," as used therein, was defined to mean the refuse accumulation of animal or vegetable matter, liquid or otherwise, attending the preparation, use, cooking, dealing in, or storing meat, fish, fowl, fruit or vegetables. The court held this to mean such refuse and discarded matter of the kinds mentioned which in fact had been discarded and rejected as of no further use for any beneficial purpose for food of any kind, and that, when so considered, the substances were and should be regarded as in themselves nuisances, for the removal and abatement of which the city could lawfully, by ordinance, grant an exclusive license to one individual as an exercise of the police power for the benefit of the public health. It is

also held that the granting of an exclusive license to remove such unwholesome matter is not in restraint of trade, such removal not being a business, trade or occupation within the meaning of the word when used in stating the principle invoked for the purpose of having the ordinance declared void as being in restraint of trade.

The principle on which rests the right of a city to grant an exclusive privilege to collect and remove those noxious and unwholesome substances which menace the public health and endanger the welfare of the citizens seems to be that not only the prevention and abatement of those accumulations of substances which are in themselves nuisances and dangerous to the health of a community is necessary and essential for the preservation of health; but also because of their unwholesome and noxious character the proper and safe removal and disposition of such substances must for the benefit of the public welfare, be in such manner and methods, at such times, and over such particular routes of travel as will best subserve the public interests, and that this may best be accomplished when such removal is under the direct control and immediate supervision of the city authorities, or with an agency of its own selection, with whom it may contract for such purpose. It is as necessary that the abatement or removal of the nuisance shall be accomplished speedily, in a particular manner, and by certain fixed agencies, ever ready to act, and at all times under the control of the municipality, as it is that such nuisance shall not be permitted to exist in the first instance. It would, therefore, seem that as to those things which are calculated to menace the public health if not promptly and in a particular manner disposed of, and are in their nature regarded as nuisances within themselves, it is within the power of a city, for the benefit of the public health, and as a police regulation, not only to provide for the removal of such substances; but also, and as incident of the power of regulation, to grant an exclusive privilege to an individual or corporation by contract entered into for that purpose to perform

the work of removal in such manner and methods as will best accomplish the desired result. It appears reasonably clear that such results can be obtained more satisfactorily and with less danger and inconvenience to the health and comfort of the inhabitants by the employment of one who shall at all times be subject to the control and direction of the city, and be held directly responsible to it for any failure to perform in the proper manner and promptly all that shall be necessary to effectuate the desired object. What may be termed for convenience the "dead animal contract cases" illustrate the principle and the reasons therefor most forcibly. In *River Rendering Co. v. Behr*, 7 Mo. App., 345, it is held that a city ordinance is valid, when passed as a sanitary police regulation, granting the exclusive right to remove the carcasses of dead animals from the streets. It is said in the opinion: "The municipal legislature is especially charged with the preservation of the public health. That high duty lies in prevention rather than in cure. It would be poorly discharged, or not discharged at all if the surest and most well-known precautionary measures were not thoroughly put in practice against the introduction of disease. In a populous city, where large numbers of animals die every day, it is of the first importance that their carcasses be speedily removed from the centres of human habitation. The city authorities would be grossly derelict if they left the chances of removal to be determined by the owners of the animals or by the enterprise of possible purchasers. They are in duty bound to appoint special agencies for the purpose, and to render performance certain by whatever means their best judgment may suggest. If they find that this certainty can be secured only by confining the agency to a single person or corporation, upon terms of responsibility for a failure to perform, it is their duty and their privilege to so secure it. The agency so appointed is rather the instrument in the hands of the municipal authorities for the fulfillment of a public duty, than the beneficiary of an exclusive privilege." Says Mr. Justice

Field in *Alpers v. City and County of San Francisco*, 32 Fed. Rep., 503, 505: "There is no doubt that the contract between the plaintiff and the city and county of San Francisco is one within the competency of the municipality to make. It is within the power of all such bodies to provide for the health of their inhabitants by causing the removal from their limits of all dead animals not slain for human food, which otherwise would soon decay, and, by corrupting the air, engender disease. And provisions for such removal may be made by contract, as well as the performance of any other duty touching the health and comfort of the city; its authorities always preserving such control over the matter as to secure an observance of proper sanitary regulations."

But in the exercise of police powers conferred upon cities for the benefit of the health of the inhabitants and to preserve the public welfare and comfort, and conceding the right to take possession and remove through its own agencies or by granting the exclusive privilege to one with whom they may contract for that purpose those substances which are inevitably and intrinsically nuisances and injurious and unwholesome, can an ordinance be upheld and justified as broad and of so sweeping a character as the one under consideration, which includes all accumulations of ashes, stable manure, rubbish, debris, etc., many different kinds of which may properly be regarded of some utility to the owner or others and which are not *per se* noxious and harmful? Is a city empowered to contract with one individual, and authorize him exclusively to go upon the private premises of the inhabitants, collect and remove at the owner's expense all such substances, and to make it a penal offense for another to engage in the performance of the same kind of labor? Can the city, merely by its fiat, declare all and every substance of the kind mentioned nuisances, and direct their abatement and removal through the agency of an exclusive contractor? The personal rights and property interests of the citizens have, with an unvarying rule, in all the author-

ities cited, been respected and preserved, and in *Smiley v. MacDonald*, 42 Nebr., 5, is announced the same rule in the last paragraph of the syllabus, wherein it is held: "The legislature can not, under the guise of police regulation, arbitrarily invade private property or personal rights. The test when such regulations are called in question is whether they have some relation to the public health or public welfare, and whether such is, in fact, the end sought to be attained." By the provisions of the ordinance under consideration neither the owner nor occupant of the premises nor a person employed for that purpose can haul or transport within the corporate limits of the city any of the substances included in the ordinance, even though such material might be utilized for some beneficial purpose. He is prevented from disposing of it in any manner, and must submit to its collection and removal by the city contractor in the manner and by the means pointed out in the ordinance. Stable manure has value not only for the purpose of fertilizing lawns and gardens in the city, but is also highly prized by the thrifty husbandman in agricultural communities, because it enriches the soil and increases the yield of the crops. Cinders and ashes may be and are regarded as useful for many purposes. Many other substances coming within the meaning of the language of the ordinance in the nature of debris, rubbish, and other waste material which might be specifically mentioned could probably be used for some beneficial purpose, and many others having no utility like those referred to are not within themselves nuisances and a menace to the health of the public. It is quite true their accumulation in unreasonable quantities and for unreasonable length of time would render them nuisances, and to prevent which all reasonable regulations may be imposed. These are all classed in the ordinance in the general category of dead animals, garbage, and other unwholesome and noxious substances, and made the subject of the same regulation under the provisions of the ordinance, and the right to collect and to remove all such material

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and substances given exclusively to the city garbage contractor. Such attempted regulation is, in our judgment, unreasonable, oppressive and contrary to a sound public policy. The ordinance not only grants a monopoly, always odious in the eye of the law, without justification or necessity therefor as a sanitary measure for the protection and preservation of the public health, comfort and welfare, but is also an unwarranted invasion of the natural rights of the inhabitants of the city. It is true the banker, the merchant and the lawyer may remove from their own premises, and with their own teams, stable manure, but nothing else. The man without a team and the one who desires to earn an honest living in removing for others these things which are not in themselves injurious to health are completely debarred. The personal right of the individual must give way regarding all the matters mentioned to the exclusive right of the contractor to collect, transport and dispose of all such accumulations. Not only is the owner's property taken from him when he could perhaps dispose of it or make arrangements for its disposal to some advantage, but he is compelled to bear the expense of the taking. We can not believe such an ordinance can be justified and upheld by the application of any sound principle of law. In *Re Petition of Vandine*, 6 Pick. [Mass.], 187, 191, it is said: "If the regulation is unreasonable it is void; if necessary for the good government of the society it is good." In *State v. Hill*, 4 Municipal Corporation Cases [N. Car.], 111, it is held in the syllabus that an ordinance regulating scavenger work must be reasonable in its provisions and not necessarily interfere with natural rights; and if it does interfere with such rights the public necessity must appear. In the opinion it is said by the author: "The prisoner is not charged with carrying on the business of a public scavenger, but simply with doing the work for one man; and it is admitted in the argument that the effect of the ordinance would be to prevent the owner himself from removing the refuse from his own premises. This is clearly an interference

with a natural right, and, while this may be allowable on the ground of public necessity, some such necessity must appear, and the ordinance must be reasonable in its provisions,"—citing in support thereof *State v. Higgs*, 35 S. E. Rep. [N. Car.], 473; 1 Dillon, *Municipal Corporations* [4th ed.], sec. 319; 2 Wood, *Nuisances* [3d ed.], sec. 745; *Mayor v. Radecke*, 49 Md., 217. It is also there said, page 118, what is pertinent to the case at bar: "We do not say that the defendant, or even the owner of the premises, had the right to clean out their closets in a manner offensive to their neighbors, or detrimental to the public health and comfort. They would be subject to such reasonable regulations as were necessary to attain these ends. Nor do we say that the city might not, under reasonable regulations, require any one to take out license before acting as a public scavenger, or even do the work through its own officers." The right of reasonable regulation for the prevention of nuisances of every kind, and the method of removal through and over the streets of a city of all accumulations of refuse matter, rubbish and other waste material for the purpose of sanitation and in the interest of the general health and comfort of the inhabitants, should be and is fully recognized. It is but the exercise of an authority properly appertaining to a municipality in the interest of the public, and to promote and preserve the welfare and convenience of all the people; but there must be a line of demarcation beyond which the authorities can not go without assuming powers in excess of those properly belonging to them, and in the case at bar we can but conclude that such powers have been transcended.

The ordinance is likewise invalid because it creates a monopoly. It is not competent for the city to grant an exclusive privilege to one individual to gather and remove those substances which are not *per se* nuisances. There can be, in the nature of things, no reasonable necessity for the city to gather and remove from the private premises of the inhabitants the accumulations of rubbish and

waste material which are not in themselves, and when not allowed to accumulate in unreasonable quantities, nuisances. How can it be said that a necessity exists, in order to protect the public health, to enter private grounds, and remove therefrom the refuse of the barn, ashes from the yard, and other material not offensive in itself if not permitted to accumulate in large quantities and for an unreasonable length of time? By what process of reasoning can it be said that the owner may be deprived of the right to keep his premises neat and clean, and remove all such material as rapidly as it may accumulate in such quantities as to warrant its disposition, and under such reasonable regulation as to the method of removal as may be imposed by the authority of the city? Why and for what reason must he engage only the city contractor to perform such services? If such may be lawfully required in the interest of proper sanitation laws, then may not the city grant an exclusive privilege to perform all work of drayage, hauling of material of whatsoever description, in order that a possible nuisance may be prevented? It can not, we think, be said, as was said in the Michigan case, *City of Grand Rapids v. De Vries*, 82 N. W. Rep. [Mich.], 269, that the removal and hauling of such substances is not a trade or occupation recognized by law. It may well be doubted whether the reason given in that case for holding the exclusive privilege granted not a monopoly is a valid one. We are all cognizant of the fact that scavenger work has a well accepted and defined meaning, and the occupation or business, lowly though it be, has existed and been recognized and regulated for ages. Certainly hauling refuse from barns, ashes, rubbish and other waste matter is a legitimate calling, and engaged in whenever opportunity affords by many as one of the means of acquiring a livelihood. Why license drays, scavenger wagons, teamsters and others engaged in hauling from place to place those things necessary to be carted from the owner's premises in cities and towns in order to prevent them from becom-

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ing nuisances, if the trade and calling is not legitimate, and so regarded and recognized by law? The reason for the rule is fully stated and discussed in the case of *In Re Lowe*, 54 Kan., 757, and, although its application in that case is not supported by the weight of authority, yet in the case at bar the principle should be applied, because the right to transport and remove rubbish, ashes, manure and other waste material not of itself a menace to the public health, must be regarded as a lawful calling, and the attempted deprivation of the right to engage in it by all who may comply with all reasonable regulations pertaining to the subject is in restraint of trade, and therefore void. It follows that in the enactment of the section of the city ordinance now under consideration the city exceeded its powers, and for that reason the section should be, as was by the trial court, adjudged invalid and unenforceable.

The judgment of the district court is therefore accordingly

AFFIRMED. .

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FILED MAY 21, 1902. No. 12,603.

Error Proceedings: LIMITATION. In a law action, which can be reviewed only by proceedings in error, where a motion for a new trial on the ground of alleged errors occurring during the trial is seasonably presented, and not ruled upon until after rendition of the judgment in the cause, the time in which error proceedings may be begun will not begin to run until a ruling is made by the trial court on the motion for a new trial.

ERROR from the district court for Lancaster county. Tried below before FROST, J. Heard on motion to dismiss. *Motion overruled.*

E. C. Strobe and D. J. Flaherty, for plaintiff in error.

W. E. Blake, J. W. Deweese and Frank E. Bishop,
contra.

HOLCOMB, J.

The defendant in error presents a motion to dismiss the error proceedings in the present action instituted in this court, because not commenced within six months from the date of the rendition of the judgment complained of, as is provided shall be done by section 592 of the Code of Civil Procedure.

The action in the lower court was one at law, and was tried to the court without a jury. The findings by the court and the judgment resting thereon were made and rendered on July 15, 1901, and immediately extended on the journal of the court. On the following day, and within the time required by statute, a motion for a new trial was duly filed, assigning numerous errors alleged to have occurred during the trial of the cause as grounds for sustaining the motion. This motion appears not to have been ruled upon by the trial court at the term at which filed, which adjourned *sine die* July 20. On the date of the final adjournment, it was ordered that all pending motions not otherwise disposed of be continued until the next term. On October 8 the motion for a new trial came up for consideration, and was by the trial court overruled. The error proceedings were begun within six months from the date of overruling the motion for a new trial; but more than six months had elapsed from the actual rendition of the judgment which it is sought to have reversed. The question, therefore, which is presented, is whether, when the motion for a new trial is presented after the judgment is rendered,—which is usually the case when a law action is tried to the court without a jury,—the limitation of time within the meaning of the statute regulating the commencement of error proceedings to obtain a reversal of the judgment complained of, will date from the time of the actual rendition of the judgment, or from the time of the court's ruling on the motion for a new trial, filed subsequent to the rendition of such judgment, but at the same

term of court, and in due season, under the provisions of the statute. In considering the question, it is well to keep in mind that the record as presented in the case at bar is different from what would be the case where the motion for a new trial is presented after a verdict of the jury or finding of fact by the court, and before rendition of the judgment; the judgment in such cases being reserved until the motion for a new trial is disposed of. When the ruling on the motion for a new trial precedes the rendition of the final judgment, no difficult question is presented as to when the time allowed for the commencement of error proceedings begins to run; the ruling on the motion for a new trial in such case being only an interlocutory order, and not final in such a sense as to constitute a final judgment from which error proceedings would lie. *Smith v. Johnson*, 37 Nebr., 675. In the case at bar, the court at the time of the rendition of the judgment gave no opportunity to either party to present to it any legal reason they might have why a new trial should be granted, and thus lay the foundation for a reviewing court to pass upon the regularity and correctness of the proceedings had at the trial. These matters where judgment is rendered as in the case at bar under our practice must, in the nature of things, be presented subsequently to the time of the rendition of the judgment, and, if presented in due season, there can be no doubt of the authority of the court to retain jurisdiction and control of the cause for the purpose of ruling on such motion, and it may, we think, be said that the judgment is rendered in contemplation of further action before its final disposition in the event such a motion be filed. We speak only with relation to the statutory motion for a new trial, which is required to be filed at the same term the finding, verdict, judgment or order is entered or returned, and within three days therefrom. As to all other statutory grounds for granting new trials, we think they must be regarded as collateral in their nature, and as having no effect on the time within which error proceedings to secure a review of the main action are to be begun. It

is also clear that, before this court is authorized to review alleged errors committed by the trial court, its attention must, with but few exceptions, first be challenged to such alleged errors by motion for a new trial. We have also held that, as to those alleged errors which are required to be assigned in a motion for a new trial, they are not reviewable in error proceedings, unless it is alleged in the petition in error and shown by the record that the court erred in overruling the motion for a new trial. *James v. Higginbotham*, 60 Nebr., 203. The prior utterances of the court on the subject have not been altogether consistent, but upon a careful examination of all the cases in this court having a bearing on the question we arrive at the conclusion that the case of *Sharp v. Brown*, 34 Nebr., 406, which overrules some prior decisions, and which has since been adhered to, announces a sound rule of practice, which is supported by both reason and authority and is warranted by the language of the statute under consideration. We think such a construction is better calculated to preserve the rights of litigants to have their cases reviewed on error in the court of last resort, than is the one we are asked to adopt by sustaining the motion to dismiss the error proceedings in the case at bar because not commenced in time. In 2 Cyclopedia of Law and Procedure, 793, under the title "Appeal and Error," it is said: "In some jurisdictions, if the motion or a petition for rehearing or new trial is made or presented in season and entertained by the court, the time limited for an appeal or a writ of error does not begin to run until such motion is disposed of, the judgment or decree not taking final effect for the purposes of the appeal or writ of error until then; while in others the time is not extended by making such application." The examination of the numerous authorities cited discloses that numerically the courts of the different states are almost equally divided, with the United States supreme court holding to the rule that the time does not begin to run until the motion for a new trial or rehearing has been ruled upon. Of course, in many of the jurisdic-

tions referred to the language of the statute has much to do with the conclusions reached regarding the matter. In *Sharp v. Brown, supra*, it is held: "Proceedings in error in the supreme court may be commenced within one year from the time the motion for a new trial is overruled." This language, however, must be understood in the light of the facts in that case as disclosed by the record, which shows a trial to the court, the rendition of the judgment, and thereafter the presentation of the motion for a new trial, which was not ruled upon for some time yet later. In the opinion it is said by MAXWELL, C. J.: "In *Hollenbeck v. Tarkington*, 14 Nebr., 430, it was held that the transcript must be filed within one year from the date of the judgment, without regard to the time when the motion for a new trial was overruled, and this ruling is now insisted upon here. In that case this court cited and approved that of *Ham v. St. Louis Public Schools*, 34 Mo., 181. We are satisfied, however, that both of the cases cited place too narrow a construction upon the Code, and this case fairly illustrates the injustice of the rule where the ruling on both motions seems to have been greatly delayed. We are satisfied that justice will be promoted by holding that final judgment will date from the time a motion for a new trial is overruled and final judgment in fact rendered. The motion to dismiss, therefore, can not be sustained." This authority has since been adhered to as governing in such cases, and we think it must now be regarded as the settled rule in this state. "Under our dual practice as to review of actions tried in the lower court by writ of error and by appeal, we have recognized that a distinction existed as between the two modes of procedure, holding that in appeal cases in actions in equity the time begins to run from the date of the rendition and entry of the final decree or order sought to be reviewed, because in such actions a motion for a new trial is not essential to obtain a review of the trial had in the district court on appeal. Says NORVAL, J., who wrote the opinion in *Smith v. Silver*, 58 Nebr., 429, 431, in deciding that an appeal

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must be taken within six months from the time of the entry of the decree or final order: "The principle governing *Sharp v. Brown*, *supra*, is not controlling. A motion for a new trial is indispensable to a review by proceeding in error of the rulings of the trial court made during the progress of a trial, or of any question which is proper to be raised by a motion for a new trial, as that the verdict is contrary to the evidence, and the damages are excessive or inadequate. *Smith v. Spaulding*, 34 Nebr., 128; *Jones v. Hayes*, 36 Nebr., 526; *Miller v. Antelope County*, 35 Nebr., 237; *Zehr v. Miller*, 40 Nebr., 791; *Brown v. Ritner*, 41 Nebr., 52; *Kochler v. Summers*, 42 Nebr., 330; *Losure v. Miller*, 45 Nebr., 465; *Gaughran v. Crosby*, 33 Nebr., 33. But a motion for a new trial is not essential to a review of an equity cause on appeal. *Swansen v. Swansen*, 12 Nebr., 210. In the course of the opinion in the case last mentioned it is said: 'In our dual system of practice, an appeal in actions in equity may be taken to the supreme court from a final decree in the district court, at any time within six months from the rendition of the decree, and no motion for a new trial is necessary, while in actions at law and equity cases, taken on error to the supreme court, a motion for a new trial, containing the errors complained of, must have been filed and acted upon by the trial court.' " In *Snow v. Rich*, 61 Pac. Rep. [Utah], 336, it is held that the judgment is not final while a motion for a new trial made within the time allowed by law is pending and undisposed of, and an appeal taken and perfected within six months from the date of overruling the motion for a new trial is taken in time; citing several prior decisions in support of the rule. Under a statute appearing to be similar to our own, in holding to the rule adopted in this state, it is said by the supreme court of Indiana in *Atkinson v. Williams*, 51 N. E. Rep. [Ind.], 721, 722: "It has been held by this court that an appeal lies within one year after the overruling of a motion for a new trial for cause. *Colchen v. Ninde*, 120 Ind., 88, 22 N. E. Rep., 94. It was so held upon the ground that a motion for a new

trial for cause is not a collateral one, but is directly connected with the judgment, and is essential to present for review errors occurring on the trial, and until the motion is overruled there can be no final judgment, within the meaning of the statute regulating appeals. When judgment is rendered upon the verdict before the motion for a new trial for cause is filed, as in this case, the final judgment, within the meaning of the statute governing appeals, is the judgment of the court overruling such motion for a new trial for cause." To the same effect are *Colchen v. Ninde*, 22 N. E. Rep. [Ind.], 94; *Moon v. Cline*, 39 N. E. Rep. [Ind. App.], 432. Speaking to the same point, and holding to the same rule, the supreme court of Alabama in *Florence Cotton & Iron Co. v. Field*, 16 So. Rep. [Ala.], 538, 539, says: "The general rule as stated by the text writers is, that 'a pending motion for a new trial, seasonably filed, keeps the cause in the trial court, and, so long as it remains undisposed of, there can be no final judgment, within the meaning of the statute regulating appeals.'" 2 Thompson, Trials, sec. 2730; Hilliard, New Trials, 59; 16 Am. & Eng. Ency. Law, 638, sec. 7. In *Walker v. Hale*, 16 Ala., 26, 27, it was said: "A court can not grant a new trial, after the term is closed, at which the cause was tried, unless a motion during the term be made, and for cause continued until the next term; but if the motion is made, the legal effect of it is to retain the matter for that purpose, under the control of the court. The cause is said to be *in fieri*, by reason of the motion; and the court may make any order afterwards that may be proper." In support of the same rule may also be cited: *Kendall v. Lucas County*, 26 Ia., 395; *Mutual Life Ins. Co. v. Barbour*, 96 Ky., 128; *Succession of Gilmore*, 12 La. Ann., 562. The judiciary act of 1789 (1 U. S. Statutes at Large, p. 85) provides that an appeal from a state court to the supreme court of the United States shall be taken within a certain time "after rendition of the judgment"; and in *Magraw v. McGlynn*, 32 Cal., 257, it is held that, if the writ of error is sued out and filed with the

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clerk and the proper security given within the time limited from the time a petition for a rehearing is denied, this is sufficient to bring the appeal within the provisions of the statute. In *Aspen Mining and Smelting Co. v. Billings*, 150 U. S., 31, 36, it is said by the United States supreme court with reference to the time in which to bring error proceedings in that court: "The rule is that if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or approval,"—citing *Brockett v. Brockett*, 2 How. [U. S.], 238, 249; *Texas & P. R. Co. v. Murphy*, 111 U. S., 488; *Memphis v. Brown*, 94 U. S., 715.

We conclude, therefore, that in a trial of a law action, where judgment is rendered before the motion for a new trial is ruled upon, and the motion is seasonably presented, the time within which error proceedings may be begun commences to run when the ruling is had upon such motion, and that, therefore, the motion to dismiss should be denied.

MOTION OVERRULED.

COLUMBIA NATIONAL BANK OF LINCOLN, APPELLEE AND
PLAINTIFF IN ERROR, V. FRED W. BALDWIN ET AL., AP-
PELLANTS AND DEFENDANTS IN ERROR.

FILED MAY 21, 1902. No. 11,425.

Commissioner's opinion, Department No. 1.

1. Deed: FRAUDULENT: ASSAULT BY THIRD PARTIES. Where a deed is assailed by third parties as fraudulent, and proof by them is introduced to impeach the recited consideration, the grantee may show by parol evidence the actual consideration, though different from the one recited in the deed.

2. **Parol Trust.** A parol trust, if clearly established, is a sufficient consideration to support an executed deed against the grantor's creditors.
3. ———. "Parol evidence to establish a * * * trust must be clear, unequivocal and convincing." *Doane v. Dunham*, 64 Nebr., 135.
4. **Creditors' Bill: PRAYER: GENERAL RELIEF.** Under a prayer for general relief in a creditors' bill, a sale of property not attached may be decreed, where the facts entitling a party to such sale are alleged and proved, although the petition asks specifically only for a sale of attached property.
5. **Evidence.** Evidence held to support a referee's finding that conveyances complained of were fraudulent and void as to creditors.

APPEAL by defendants and proceeding in error by plaintiff. Tried below before FROST, J., in the district court for Lancaster county. *Modified.*

Charles O. Whedon and Charles E. Magoon, for appellants and defendants in error.

E. E. Brown, Frank H. Woods and R. D. Stearns, contra.

HASTINGS, C.

A very extensive record is presented in this creditors' bill case. The particular matters in dispute are whether lot 12 in block 62 in Lincoln, Nebraska, was conveyed to Mattson H. Baldwin by his parents in discharge of a parol trust imposed by their grantor, A. J. Mattson; what was the actual consideration for certain real estate in Prophetstown, Illinois, also conveyed to him in 1894 by his parents; what was the real consideration for conveyances by the same parties of real and personal property in 1895 and 1896 for a nominal consideration of about \$70,000; the value of the several items of property transferred to the son by his father and mother, and the good faith of the indebtedness claimed as the consideration of the transfers.

One important contention is as to whether or not the consideration named in a conveyance is conclusive upon the parties when that conveyance is attacked for fraud.

The finding of the referee that lot 12 in block 62 in Lincoln, was conveyed to the parents, the Baldwins, not in trust for their son, but in fee simple, is earnestly assailed both as to the facts and as to the legal conclusions found by the referee.

By agreement of parties, Hon. J. R. Webster was appointed as referee to find both the facts and the law of this case. His findings, after the merely formal ones as to the location and incorporation of plaintiff; its recovery of a small judgment against Fred W. Baldwin in July, 1896; the filing of a transcript thereof, execution thereon and proceedings in aid of execution; and the recovery in December, 1896, of a judgment against both Fred W. Baldwin and Ida M. Baldwin for \$7,931.24 and costs on a note dated April 17, 1896, due May 27, 1896, the last renewal of a series of notes beginning November 26, 1894, by which notes Ida M. Baldwin pledged her separate estate, and whose consideration was a previously existing debt of Fred W. Baldwin,—continue:

“At the time said indebtedness accrued and the first of said series of notes was made by said Fred W. Baldwin and Ida M. Baldwin, and prior and subsequent thereto, until about March 10, 1896, said Ida M. Baldwin and Fred W. Baldwin were each owners of a large amount of real and personal property of aggregate value of about \$100,000.

“(a.) Ida M. Baldwin was owner in her separate right of lot 22 in Wallingford & Shamp’s subdivision, and lots 1 and 2 in block 9 of C. C. Burr’s subdivision, all in Lancaster county; also of a mortgage foreclosure judgment in this court in suit of Ida M. Baldwin *versus* Caroline Purdue against lot 2 in Wallingford & Shamp’s subdivision, recovered on a mortgage payable to said Ida M. Baldwin. Said real properties, by deeds bearing dates and reciting considerations, respectively, June 15, 1895, \$1,200, June 20, 1895, \$3,500, said Ida M. Baldwin and husband conveyed to defendant Mattson H. Baldwin; and said foreclosure judgment and her bid made on sheriff’s sale of the

mortgaged premises, she assigned to said Mattson H. Baldwin, whereby, after confirmation of sale, he obtained a sheriff's deed conveying him title to said Purdue lot, 2 in Wallingford & Shamp's subdivision.

"(b.) Said Fred W. Baldwin was owner of lot 4 in block 5 of Houtz & Baldwin's subdivision, lots 1 and 2, block 4, Capital addition, lots 11 and 12, block 99, of Lincoln, and lots 1 and 22 of Fairbrother's subdivision; and said real estate, by deeds bearing date and reciting considerations, viz., June 20th, \$500; June 20th, \$3,000; June 20th, \$——; September 18th, \$2,500,—executed by himself and his wife, Ida M. Baldwin, was conveyed to Mattson H. Baldwin. Said Fred W. Baldwin was also owner of the north half of north half of section 10, and the southwest quarter of section 3, township 11 north, range 5 east, called the 'North Farm,' mortgaged for \$4,000, and the south half of northeast quarter of section 23 in township 9 north, range 6 east, known as 'Meadow Brook' or 'South Farm,' mortgaged for \$3,000, and by deed bearing date March 18, 1895, for a consideration expressed at \$10,000, conveyed the 'North Farm,' and by deed dated September 18th, for a consideration expressed at \$6,000 (both deeds being acknowledged September 18, 1895) conveyed the 'South Farm,' to Mattson H. Baldwin; the mortgages being accounted as part of the consideration. All the stock and chattels of the 'South Farm' Fred W. Baldwin, by bill of sale dated June 20, 1895, for a consideration expressed of \$6,000, and all the chattels and stock on the 'North Farm,' by bill of sale dated February 18, 1896, for a consideration expressed of \$1,500, and all his office furniture, safe, family carriages, and horses and trappings, by bill of sale of date February 1, 1896, for a consideration expressed of \$500, conveyed and set over to defendant Mattson H. Baldwin.

"(c.) Said Fred W. Baldwin and Ida M. Baldwin, by deed conveying to them jointly, were owners of lot 12 in block 62 in the city of Lincoln, and by deed bearing date September 10, 1895, reciting a consideration of \$8,000, conveyed the same to said Mattson H. Baldwin."

The referee then finds that a part of the deeds were recorded March 10, 1896, and the rest later; that there was no possession nor ownership exercised by the grantee till February or March, 1896, and to that time the parents remained in possession; that by deed dated December 2, 1894, the parents conveyed to the son, for an expressed consideration of \$5,000, real estate in Prophetstown, Illinois, which deed was recorded September 1, 1895. The referee also found that from September, 1894, to November, 1896, there were sixteen suits commenced in justice court, three in county court and five in district court, against Fred W. Baldwin, on claims aggregating over \$70,000; that the above conveyances embraced practically all of the grantors' property, and left them insolvent; that, to sustain these conveyances, appellants asserted they were made in discharge of indebtedness of the parents to the son, except as to lot 12 in block 62, which was claimed to have been conveyed in discharge of a trust under which the parents held it for the son till his coming of age. The referee finds: That the property in question was mostly derived from A. J. and Lucy B. Mattson, an uncle and aunt of Mrs. Baldwin, in whose family she was brought up, and who stood to her as parents; that Mattson H. Baldwin was born December 2, 1873, and named for the great uncle, A. J. Mattson; that the latter at some time prior to 1884 set aside \$25,000 of securities in a tin box marked "Mattson H. Baldwin's Box and Contents," and placed in it, also, the following memorandum: "These inclosed notes and mortgages, and all their value, is to be delivered to Mattie Baldwin in case he outlives me, but either these papers or their equivalent amt. is to be delivered to him without any form of law, as this is a 'free gift to him' for his name from the owner of these papers, and no law or captious person, must interfere or thwart my wishes here expressed. A. J. Mattson." And in September, 1884, the following: "Prophetstown, Ill., Sept. 1884. The inclosed notes and mortgages are the free gift of A. J. Mattson to Mattie Baldwin. Some good, honest, capable man or woman,

must aid and assist him in care and collection of the inclosed and make good use of this free gift to the little boy. I was once a little boy myself and my only legacy was the advice of a good father and pure and loving mother. A. J. Mattson"; that A. J. Mattson retained the dominion and control of the box till his death; that in 1884 he took out \$8,000 worth of securities and bought this lot 12 in block 62 with the proceeds, and later made a warranty deed of it to Fred W. and Ida M. Baldwin, and in 1886 delivered this deed to Ida M. Baldwin, and she and her husband held the premises and enjoyed the income from them till 1896; that A. J. Mattson was moved by the wish to provide a more commodious home for Ida M. and Mattson H. Baldwin, and, in the letters to the latter, spoke of it as "your new home," and of a farm whose title was in the father, as "your farm"; that at A. J. Mattson's death, in 1886, \$15,000 in securities were found in the box,—\$2,000 in addition to the \$8,000 having been removed; that A. J. Mattson left his estate to his wife, and she delivered the box and contents to Mattson H. Baldwin, and added \$2,000 to make the amount \$25,000, with what had been paid for lot 12, block 62; that in 1889 Lucy B. Mattson died, leaving legacies of at least \$33,150 each to Mattson H. Baldwin and Ida M. Baldwin, and \$28,150 to Fred W. Baldwin,—these amounts in addition to the \$17,000 previously received by Mattson H. Baldwin; that at this time Mattson H. Baldwin had been impliedly emancipated, and had received into his own control the \$17,000 from the box; that Fred W. Baldwin was administrator of the estate of Lucy B. Mattson, and was appointed guardian for his son; that he receipted as such guardian for his son's legacies under Mrs. Mattson's will, but turned over to the son special legacies of \$12,000 and took into his guardian accounts only the remainder which came to the son as residuary legatee of Mrs. Mattson; that Mattson H. Baldwin, during his minority, with his father's knowledge and consent, conducted a business under the name of Baldwin Tailoring Company, which resulted in a loss to him; that the

father settled satisfactorily with the son, when he came of age, for the \$21,150 received as residuary legatee from Mrs. Mattson; that the funds controlled by Mattson H. Baldwin himself and those by his guardian were kept in one bank account, on which both drew checks, and were so confused that it was impossible to distinguish them, or to audit the two funds separately; that no books of account were kept by the son and father, but while the parents were solvent the husband and wife had separate bank accounts; that there were sundry transactions by which the guardian became indebted to the ward, which should be treated as settled,—one being a pledge of the ward's securities by the guardian to Mrs. E. A. Richards in May, 1893, for the guardian's debt, which matter was adjusted in the guardian's final settlement; that thirteen items of indebtedness, aggregating \$4,088.93, of the father to the son, were testified to in former legal proceedings as settled by the conveyance of property in Prophetstown, Ill.; that the notes were surrendered; that items aggregating \$7,885, amounting, with interest to September, 1895, to \$9,963.06 of debts, minuted on one of the notes at about that date, were all the valid indebtedness existing during the time of these conveyances; that other notes of the parents to Mattson H. Baldwin, aggregating \$8,808.15, produced at the hearing, were not proved with the clearness required in a contest with creditors to sustain transfers to relatives; that certain vouchers, claimed to have been lost in the course of proceedings in aid of execution on plaintiff's small judgment, were lost, if at all, by defendants' fault; that certain expenses of horses at races should be deemed merged in the notes, and not items of indebtedness; that Ida M. Baldwin was not indebted to her son when the conveyances were made; that the evidence of an oral declaration of trust in favor of the son by A. J. Mattson at the time of delivering to the mother the deed for lot 12 in block 62, was of doubtful admissibility, and insufficient to establish such trust, considering the continued control of the property by the parents after the son's

majority, and until they were pressed by debts; that the deed indicates no such trust estate, and that the parents took a title in fee, uncharged with any trust for the benefit of the son. The referee also found that the son had actual knowledge of the condition of his father's affairs, and that the debts were pressing, and that he took the conveyances for the purpose of enabling the parents to avoid payment, and to hinder, delay and defraud plaintiff and other creditors. He also found that Mattson H. Baldwin in 1895, after his majority, represented to one of the plaintiff's directors, in a conference as to an extension of plaintiff's note, on the suggestion of a mortgage upon lot 12 in block 62, that "Uncle Mattson had given that to his mother for a home and she would not mortgage it."

The referee's conclusions of law were:

(1.) That placing the securities in the box, and marking it, did not carry title to Mattson H. Baldwin, and that the ownership in the securities remained in A. J. Mattson. (2.) That the title in lot 12 in block 62, on its purchase with means taken from the box, vested completely in A. J. Mattson. (3.) That the conveyance to Fred W. and Ida M. Baldwin vested complete title, uncharged with any trust. (4.) That the conveyance to the son was voluntary and fraudulent, and the property should be sold to pay judgments of plaintiff and of Burton Stock Car Company. (5.) That the conveyance to the son of the mother's property, lot 22 in Wallingford & Shamp's subdivision, and lots 1 and 2, block 9, in C. C. Burr's subdivision, were likewise voluntary and fraudulent, and the property should be subjected to the judgments of plaintiff and of the Burton Stock Car Company. (6.) That lot 2 of Wallingford & Shamp's subdivision was conveyed to the son without consideration, and in fraud of creditor's rights, and should be subjected to the judgments. (7.) That the amount of expressed consideration in bills of sale of the chattel property received by the son (\$8,000) should be credited on the father's indebtedness, and the rest of such indebtedness (\$1,963.06),

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be charged as a first lien upon lots 1 and 22, in Fairbrother's subdivision, the south one-half of the northeast quarter of section 23, township 9 north, range 6 east, lot 4, block 5 in Houtz and Baldwin's subdivision, and the north one-half of the northeast quarter and north one-half of the northwest quarter of section 11, and the southwest quarter of section 3, in township 11 north, range 5 east, and the costs of this action and plaintiff's and Burton Stock Car Company's judgment as a second lien upon said premises; the costs to be first charge, should the property not suffice to pay in full.

Motion was made to vacate the referee's report and numerous exceptions were taken to the different findings of fact, and all were overruled. Exceptions to the first three conclusions of law were overruled. The exceptions to the next three conclusions of law were overruled, but the conclusions were modified to make them, in substance, as follows:

(4.) That the conveyance of lot 12, block 62, was fraudulent, and should be set aside, and premises sold to satisfy plaintiff's attachment lien and Burton Stock Car Company's judgment,—the latter as an equal lien on F. W. Baldwin's half interest. (5.) That lot 22 in Wallingford & Shamp's subdivision, and lots 1 and 2 in block 9 in C. O. Burr's subdivision, should be sold to satisfy plaintiff's attachment lien. (6.) That the assignment of bid in the foreclosure proceedings against Caroline Purdue was fraudulent, and the premises should be sold to satisfy the lien of plaintiff's attachment. Exceptions to the seventh conclusion of law were sustained. Plaintiff and the Burton Stock Car Company excepted to the modification of conclusions of law four to six and the sustaining of exceptions to the seventh one.

The court entered a decree in accordance with the six conclusions of the referee as modified, and the defendants Baldwin appeal; and the bank brings error because of the modifying of conclusions four to six, and the sustaining of exceptions to No. 7.

Appellants take up the dispute as to lot 12 in block 62 first. The actual facts are fairly represented by the referee's findings, so far as they go. The mother states that, when the deed was delivered to her, A. J. Mattson, then in his last illness, told her the property had been bought for Matt, and had been deeded to herself and husband to keep for him until he should come of age, and then it was to be deeded to him; that she received the deed to be held in trust until her son came of age; and that she so held the property. No one but herself and Mr. Mattson were present, so there is no one to contradict her. The deed had been made in October, 1885, and was retained by the grantor until September, 1886, on the occasion of Mrs. Baldwin's coming to attend his last sickness. The evidence was objected to as incompetent, seeking to establish a trust by parol, and to change the consideration named in the deed by proof of a different kind. The claim that there was a trust interest on the part of Mattson H. Baldwin in the contents of the box, and so in these premises, which were admittedly bought with a part of its contents, it hardly seems possible to allow. The memoranda show unmistakably an intent to hold the control of the property till the donor's death. The income from the securities, so far as appears, was never thought of as other than A. J. Mattson's private property. If the income was his, then the securities were also, and so far as concerns the referee's first proposition of law, that the ownership of the box and of its contents remained in Mr. Mattson till his death, there appears no ground of complaint on appellants' part. Assuming, then, that this lot 12 in block 62, and the money which bought it, was Mr. Mattson's, could he create a trust estate in favor of Mattson H. Baldwin by mere parol, in the very act of delivering to Ida M. Baldwin an absolute deed of the property to herself and her husband? If, as we think, the money paid for this property was Mattson's, and so the property was his also, and there was no resulting trust in favor of any one on his purchase of it, this would seem clearly to be creating an express

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- trust by parol. This can not be done under our statute. *Hansen v. Berthelsen*, 19 Nebr., 433, 441; *Dailey v. Kinsler*, 31 Nebr., 340, citing *Courvoisier v. Bourcier*, 3 Nebr., 55, 61; *O'Brien v. Gaslin*, 20 Nebr., 347.

It is asserted, however, that the acceptance of the deed created a moral obligation on the parent's part, which was discharged by the conveyance to Mattson H. Baldwin, and is sufficient to support such conveyance. To this proposition appellants cite *Cottrell v. Smith*, 63 Ia., 181; *Hoisington v. Ostrom*, 27 Kan., 110, and *Silvers v. Potter*, 48 N. J. Eq., 539. This last case is especially relied upon by appellants. In it a deed by a brother to a sister of property conveyed to him by a deed from his mother, absolute on its face, was upheld against his creditors, as having been made in discharge of a parol trust under which the deed from the mother was for the benefit of the grantee's brother and sisters. In that case the deed from the mother was "in consideration of one dollar and other valuable consideration," and so, also, was the deed to the sister. The New Jersey statute provides that no trust shall be shown by parol. That of Nebraska requires that none shall be so created. Upon these two points appellees seek to distinguish that case from the present one. In *Cottrell v. Smith*, a widow was assigned a share in fee simple of her husband's estate and by mistake it was given her free from incumbrances which absorbed the rest of the estate, and for which her proportion was really liable *pro rata*. Subsequently she conveyed to the heirs to correct the mistake, though under no legal obligation to do so. A creditor of hers attacked the conveyance as voluntary. The court upholds the conveyance, saying: "No person is bound to hold for his creditors what in good morals does not belong to him, but to another." *Hoisington v. Ostrom* presents no analogy to the case under consideration. The only matters decided were the validity, as against other creditors, of a transfer of a drug stock to indemnify sureties, and the fact that the transferees were sureties. The appellees to this claim that Mattson Baldwin's moral

right under the parol trust is sufficient to sustain the deed, answer: First, that the consideration of the deed is named as \$8,000, and one of another kind may not be proved when the deed is attacked for fraud by third parties; second, that the evidence is in truth, as the referee found, insufficient, when taken in connection with the circumstances of the case, to establish the parol trust. The referee, in ruling against the first contention, indicates his doubt as to the admissibility of evidence to change in its nature the consideration of a deed. Appellees earnestly insist that his ruling was wrong, and that no consideration different in kind from that recited may be proved. They cite *Burrage's Lessee v. Beardsley*, 16 Ohio, 438. In this case title was claimed through deed to the grantor's wife and children. Defendant claimed title through the same grantor by a subsequent mortgage and its foreclosure. The grantor had remained in possession and exercised ownership for years after making deed under which plaintiff claimed. That deed recited a consideration of \$3,000. It was shown that nothing was paid, and this showing was held to do away with the right of possession under the deed, and all proof that the real consideration was blood and affection on the part of the grantor for his wife and children was rejected. This was sustained on appeal on the ground that, as against third parties, a deed accepted on one ground can not be sustained upon another; citing *Hinde's Lessee v. Longworth*, 11 Wheat. [U. S.], 199, 213; *Clarkson v. Hanway*, 2 Cox's Peere Williams [Eng.], 203; Chancellor Kent in *Hildreth v. Sands*, 2 Johns. Ch. [N. Y.], 35, 43; and 1 Phillips, Evidence, 549.

In Cowen & Hill's notes to the work last cited it is remarked that the English decisions only go so far as to hold that proof may not be given of a consideration of a different species from that named in the deed. 2d vol., 5th ed., 579.

Chancellor Kent, in *Hildreth v. Sands*, seems to have acted on *dicta* of the English cases, and held that where a deed is attacked for fraud the party is bound by the con-

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sideration alleged. In that case \$4,500 was the consideration named. It was held inadequate, and that the grantee could not be permitted to prove any additional,—at least, none of another kind.

In *Patterson v. Lamson*, 45 Ohio St., 77, under a statute providing that a wife's lands should descend to the husband on her death intestate, if they came not by devise, descent or deed of gift, it was held incompetent, in an attempt to defeat the husband's right after the wife's decease, to show by parol that lands conveyed to her for an expressed money consideration paid by her were in fact a gift from her father, and that the latter paid the consideration.

In *Stoltz v. Vanatta*, 32 Week. L. Bul. [Ohio], 100, a deed from a husband through a third party to his wife purported to have been made in consideration of \$1. The property was alleged, by a creditor attacking the deed, to be worth \$2,000, and was admitted to be worth \$1,600. The answer alleged that by mistake of the scrivener various valuable considerations passing from the wife to the husband had been omitted. The court held that the deed was a voluntary one on its face, and could not be transformed into one for value by parol proof.

In *Henderson v. Dodd*, 1 Bailey Eq. [S. Car.], 138, as in *Hinde's Lessee v. Longworth*, *supra*, evidence of the relationship of the parties and of the actual consideration was admitted, not to vary the consideration expressed, but to rebut any inference of fraud upon a subsequent creditor. What would be the holding as to pre-existing debts is not indicated.

Galbreath v. Cook, 30 Ark., 417, holds that proof can not be admitted to show that the real consideration of a deed reciting a money payment of \$100, was a contract of marriage, and does so on the ground that the parties to a deed attacked by a creditor for fraud, can show no consideration of a different kind than recited. The authority most relied upon was *Betts v. Union Bank*, 1 Har. & G., 175,—a case of precisely similar na-

ture, argued by Reverdy Johnson and Chief Justice Taney, involving the same question. The latter case is reaffirmed in *Christopher v. Christopher*, 64 Md., 583, in a holding that a gift can not be proved to defeat a vendor's lien, where the deed of conveyance recites a money consideration.

Houston v. Blackman, 66 Ala., 559, is a holding that where a husband has made a deed to his wife, reciting a consideration of love and affection, the parties can not, when the deed is attacked as voluntary, defend it, as against debts existing when it was made, by parol proof of a valuable consideration.

Scoggin v. Schloath, 15 Ore., 380, 383, is a case where a small money consideration was recited in a deed, and proof tending to show, in addition, payment of a considerable pre-existing debt, was held admissible, as being of the same species as the recited consideration; but the evidence of the parties is found insufficient to establish the facts to the satisfaction of the court.

In *Leach v. Shelby*, 58 Miss., 681, however, a deed made to a young woman for an expressed consideration of \$1,600 was attacked by the grantor's previous creditors as fraudulent, and was upheld, although it appeared by the evidence that no money was paid, but the real consideration was the marriage of the grantee to the grantor. The court says: "The deed is assailed for fraud. The charge is sought to be supported by evidence that while the deed purports to have been for \$1,600 not a cent was paid or intended to be paid. It is competent to show that although the valuable consideration mentioned did not exist, another valuable consideration did exist, and, therefore, that the deed was not fraudulent or voluntary. The assailant of a conveyance for fraud may show the truth as to its consideration whatever are its statements. He who is interested to uphold the conveyance is entitled to show the real consideration in order to maintain it. Truth is the proper object of investigation and both parties should stand on the same

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footing and have equal opportunity to establish it." Numerous cases are cited, and Wharton on Evidence, section 1046, to the effect that, while a party claiming under a deed is generally shut up to prove only a consideration of the nature of that recited, this rule does not apply when the consideration is impeached for fraud. In that case any actual consideration may be shown.

In *Lewis v. Brewster*, 57 Pa. St., 410, ejectment was brought by a husband's creditors on an execution sale of land, and the wife was permitted to show, on an issue as to fraud, that a deed to her by the husband's father was a gift to provide a home for the family, though the deed recited a money consideration. The case relied upon as warranting such action is *Jack v. Dougherty*, 3 Watts [Pa.], 151. In that case, on careful consideration, such evidence was admitted, not to change the instrument, but to rebut the presumption of fraud in the apparent consideration.

In *Toulmin v. Austin*, 5 Stew. & P. [Ala.], 410, on a contest between a purchaser at execution sale on a levy against the husband and a wife's trustee, the latter was allowed to support a deed reciting a money consideration by evidence that it was made pursuant to a marriage settlement.

Brown v. Lunt, 37 Me., 423, was a case where a deed had been made to a merchant in March, by one indebted to him to secure payment of the debt and also advances to clear the land of incumbrances. In April he conveyed to his grantor's wife, taking two notes, of \$1,000 each, signed by her and indorsed by the husband, and secured by a mortgage on the land. This was agreed upon as the amount due the merchant. The farm was worth \$10,000 to \$12,000, and the deed to the wife recited a money consideration. In May the merchant failed, and his creditors attacked the deed. The court not only permitted the parol trust on which he had obtained title to be shown, but found that the deed was upon sufficient consideration, although the parol trust was unenforceable. This consideration was held to be not so inconsistent with the one named in the deed that it might not be proved.

A precisely opposite holding in *Smith v. Lane*, 3 Pick. [Mass.], 205, is discussed and disapproved. In the last case a woman, whose husband had conveyed his life estate in some lands occupied by her to her father, was refused permission to prove against the father's creditors that a conveyance to her, for an expressed small money consideration, was really in discharge of a parol trust in her favor.

In *Bullard v. Briggs*, 7 Pick., 533, the Massachusetts court seems to have followed the principle of the Maine case, and admitted evidence of the trust to rebut a claim of fraud.

In *Velten v. Carmack*, 23 Ore., 282, a woman conveyed some lands during coverture without her husband's signature. A statute of that state authorized her to do this if the land came by gift, inheritance or devise. Otherwise it could only be conveyed by a joint deed of husband and wife. The property had been conveyed to the woman by her father for an expressed consideration of \$1,000. It was held that her grantee, as against the daughter's creditors, might show that the real consideration of her father's deed was blood and affection and the land a gift.

In *Eystra v. Capelle*, 61 Mo., 578, in an effort to collect a part of the consideration for a deed, the evidence, as in the case now before us, was admitted, but was held insufficient on the ground that "to show that the consideration for a deed was other than that named in it, the evidence must be of the most clear and satisfactory character."

The precedents are thus conflicting as to the admission of evidence to vary the consideration of a deed, but we think the ground on which it was admitted in *Hinde's Lessee v. Longworth*, 11 Wheat. [U. S.], 198, 213, is good here, notwithstanding the plaintiff is not a subsequent creditor. The real question is whether the transfer from the parents to the son was fraudulent. The conveyance having been attacked as fraudulent because the consideration was not paid, any evidence going to rebut the presumption of fraud so arising is admissible. The \$8,000 recited in the deed was not paid. Plaintiff alleged it was

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not. Fraud is, by statute, always a question of fact in this state; but under the circumstances, if the deed was merely voluntary, it would be presumed fraudulent. The moral consideration of an actual trust, however, would, we think, if clearly established, support the deed. The showing of it to rebut the presumption of fraud was, we think, in accordance with principle and the better authority, as well as with our statute making fraud a question of fact. It was also in accordance with the spirit, at least, of section 339 of the Code of Civil Procedure, allowing the whole matter necessary to make any detached fact understood to be given in evidence. As was said in *Leach v. Shelby*, 58 Miss., 681, the object of the investigation is to ascertain the truth, and where plaintiff was denying the deed's recitals, and was proving the actual facts, it would seem mere justice that defendant be allowed to repel the inference of fraud by showing them all. We conclude the referee was not wrong in holding that an honest parol trust would support an executed deed, and might be shown when attacked by creditors, although the only recital in the deed was of \$8,000 cash consideration.

Was the existence of the trust established? The direct evidence was given by Mrs. Baldwin, and has been stated. The corroboration is in the way of expressions of affection for the boy, and of the intention with respect to the property, on the part of A. J. Mattson. They are fairly, but not very fully, indicated in the referee's findings. Mr. Mattson's letters were numerous, and his expressions of affection strong, but the references to the property naturally few. As the referee finds, he on one occasion refers to the premises as "your new home," and again as "your home," in letters to Mattson H. Baldwin. The latter testifies that in 1885 Mr. Mattson told him that the property had been deeded or would be deeded to his parents to hold for him until he came of age. The resources of the Baldwin family, as the referee found, came generally from Mr. Mattson. He seems to have been very far from feeling any distrust of Mattson H. Baldwin's parents, and the

idea of protecting the boy or the property he was providing for him from them seems never to have occurred either to Mr. Mattson or to his wife. The latter, it is true, divided her estate among the three in a way to indicate a separation of interests, but took no steps to secure the son's part against encroachments by his parents. Mr. Mattson was a business man of experience. He seems, by his letter-heads, to have been a notary and police justice. He made the deed to the parents jointly. It was executed in October, 1885, and was delivered in September, 1886, according to Mrs. Baldwin's statement. The family was living in the house at that time. There is nothing in the relation of the parties, or in their treatment of the property, to suggest that it was not intended to be what it remained until the bulk of the Mattson estate came into the family in 1889,—the family home. About that time a different one was found, and there is evidence that in 1890 Mrs. Baldwin was getting the rents from this property, and that she and her husband continued to do so until some time in April, 1896. At least Mattson H. Baldwin is not sure that he collected any rent before that time. The rent for April, 1896, was receipted for by F. W. Baldwin in his own name, and for May in the name of his son. As is remarked in the recent case of *Doane v. Dunham*, 64 Nebr., 135, "Parol evidence to establish a resulting trust must be clear, unequivocal and convincing." It seems certain that, while A. J. Mattson intended to provide for his godson in buying this Lincoln property it was through his parents, and not by vesting him with any absolute interest in the property. The actions of the parties in holding the beneficial interest in the property, and the conveyance to the parents, are themselves evidence against the mother's statement. The declaration on the part of the son and father, testified to by one of the bank directors, that the property was the mother's and the son's acquiescence in the statement, from the records, that it was the joint property of the father and mother, at the very time of giving credit to the mother, which is sworn to by the cashier, and

the vice-president's statement of his hearing the son's declarations that his mother had property, and was good for the \$8,000 (amount of the note under consideration), are all denied by the Baldwins, but were accepted apparently by the referee as true,—the one to the director, Dr. Dayton, expressly so, in the findings. This was made, if at all, in October, 1895, and almost a year after Mattson H. Baldwin, by the mother's statement, was entitled to a deed, and within a few days after the date of the deed to him. The evidence, as a whole, entirely fails to convince us that the referee was wrong in finding that there was no moral consideration behind this deed. Notwithstanding the fact that the purchase by Mr. Mattson was with funds from the box he had labelled "Mattson H. Baldwin's Box and Contents," and that the mother says the deed was given to her with an injunction that she and her husband were to deed the property to the boy when he came of age, the moral claim of these creditors seems stronger than his, in view of all the circumstances of the transfer. We think the decree of the court as to this property should be affirmed.

The same conclusion has been reached as to the rest of the property attached. The title to it was in Mrs. Baldwin till its conveyance to her son. It is claimed that it was her equitable right to give it to him in payment of her husband's indebtedness, and that some of it was in fact held in trust for him,—was obtained through foreclosure on loans in her name, but made with his money, and had been improved with his money. This last consideration is claimed only as to some of it, and, if true, would not support a conveyance of it all in fraud of plaintiff's rights. Her obligation to plaintiff bound her separate estate. She was under none to her husband's creditors, nor to her son, as one of them. The referee, on the strength of her own testimony, found the mother was not indebted to the son, and that all her deeds were fraudulent as against the plaintiff. No definite portion of the consideration of the deeds is pointed out as due to the son or belonging to the son, ex-

cept that the mortgage foreclosure decree and bid on lot 2 in Wallingford & Shamp's subdivision, are claimed to have been based on a loan of his money in the mother's name. No voucher was produced. The father and son both swear that they know the son's money was used in the transaction, and the mother says she knows nothing about it. The evidence shows that the father and son are entirely helpless to separate their funds and distinguish their separate property, or to determine what matters have been repaid and what have not. The referee's conclusion that the son's claim was not sustained seems the only one to be reached from such evidence.

The foregoing disposes of defendant's appeal.

Plaintiff, as before stated, brings error, complaining that the action of the court, after sustaining the referee's findings of fact, was erroneous, in giving plaintiff no relief as to any but the attached property. As above stated, it is impossible to read this testimony without concluding that there is here ample evidence to sustain the referee's findings as to the facts. It is totally impossible from this evidence to strike any general balance of indebtedness to uphold all of the conveyances, regarded as one transaction, and it is equally impossible to trace out any particular portion which went to make up the consideration of any one. The father and son themselves do not profess to know, in most instances, what particular items of indebtedness made up the consideration of any particular conveyance, and entirely give up, in most cases, any attempt to harmonize the amount of such items with that named as the consideration of any conveyance. In one case in which they do so (that of the Prophetstown property) they are shown to have made entirely contradictory statements in the proceedings in aid of execution in 1896. The mother testifies only as to lot 12 in block 62. The father and son had simply handled their property together until it was inextricably mingled and held in the father's name for the most part, and, when debts became pressing, he had put it all in the son's name. Under these circumstances, there

seems no question of the correctness of the trial court's action in sustaining the referee's findings that these transfers were not sustained by proof of consideration definite enough to uphold conveyances between relatives. That the transfers were with full knowledge of the condition of affairs, and to hinder and delay creditors, is equally clear. The action of the trial court, then, in refusing plaintiff any relief as to the property of Fred W. Baldwin conveyed to the son, must have been based upon the fact that the only property specifically asked to be sold is that attached. The prayer of the petition, however, is to cancel all the conveyances, and general relief is asked. Defendants, however, claim that this bill is merely brought to enforce the attachment lien, and the relief can not be extended to include other property. This seems a mistake. The scope of the bill is clearly wider than a mere enforcement of the attachment lien. It includes relief on another judgment not connected with the attachment case. It sets out the judgment in the attachment case itself, and it attacks many conveyances of property not seized by attachment. Under the facts pleaded, and those found by the referee, as to the fraudulent character of all the conveyances, and the son's participation in the fraud, plaintiff is entitled to the additional relief, if it is recoverable under the prayer, and is reasonably needed. Defendants say that it is not needed, and is inconsistent with the prayer that the property be sold under the writ of attachment. They cite *Lord Walpole v. Lord Orford*, 3 Ves. [Eng.], 402, to the proposition that the prayer for general relief admits of nothing inconsistent with that specifically asked for. In that case the court held that the complainant could not recover as legatee under the codicil to a will of 1752, and at the same time have that will set aside on his general prayer in favor of a later one. We do not, however, see anything inconsistent in allowing specifically a sale of certain lands attached, and under the prayer for general relief, if the attached premises are insufficient, a sale of other lands to which a right is pleaded and proved.

Williams v. Hubbard, Walker's Ch. [Mich.], 28. In the case just cited it was held that plaintiff, if a conveyance of land was fraudulent, and was so pleaded and shown, might have relief as against it under a general prayer, together with specific relief as to property levied on. To a similar effect is *Clarkson v. De Peyster*, 3 Pai. Ch. [N. Y.], 319, 322. *Treadwell v. Brown*, 44 N. H., 551, gives effect to the general prayer in setting aside conveyances when not inconsistent with the specific relief prayed, though the latter is denied. It is not thought that our Code provisions have changed the rule. Code of Civil Procedure, sec. 92. If the facts found by the referee and affirmed by the trial court really existed, and there should be need of additional property to satisfy both of the plaintiff's judgments, there seems no objection to ordering a sale of other property, though it is not specifically prayed.

Counsel for appellants ask on what ground, if the son has a first lien for the discharge of indebtedness due him, is he compelled to take second-hand chattel property, instead of selecting himself the part to which such lien attaches? To us it seems more pertinent to inquire why, if the action of Mattson H. Baldwin was fraudulent, and was a participation in a fraud by his parents, with full knowledge, he was given any lien whatever? No attempt will be made here to adjust any account between father and son. It seems probable that the referee's finding in this respect understated the real indebtedness, if it be held that the son's money turned, without reckoning or accounting, into his father's hands, handled by the latter largely under the name of F. W. Baldwin & Son, with the son's assent, and lost in such business, created an indebtedness. It is possible, but, as the referee said, by no means clear, that all of the notes claimed would have come nearer the true amount. We are unable, however, to find that the transactions were an effort in good faith, and with due regard to the rights of creditors, to get what belonged to him, on the part of the son. The intimate business as well as family relations of the parties, the withholding of the

deeds from the records, the utter looseness with which the business was transacted, not only in its beginning, but after the result to the creditors became apparent, and the conflicting statements of the parties at different times, are sufficient to avoid the whole line of conveyances, and stamp them, as the referee found, fraudulent. The referee's finding of an active participation on the son's part, both before and after his majority, in the management of what was in fact a joint estate, kept chiefly in the father's name, is supported by the proofs. For the results of such management the son was largely responsible and, after misfortune came, had no right to secure himself, in the manner attempted here, by secret conveyances of all the property available to pay creditors. In such a view it becomes immaterial as to whether there was some genuine indebtedness or not. Its amount is material to this controversy only as it tends to sustain or disprove the claim of good faith.

It is recommended that the decree of the district court so far as it directed a sale of property to pay plaintiff's judgment, be affirmed, and, so far as it released the property not attached, be reversed, and that the attached property be directed to be first sold, and, if insufficient to pay the costs of this action and the decree, that the other premises mentioned in the seventh finding of the referee, or so much thereof as may be necessary for the purpose, be sold, and the proceeds so applied.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the decree of the district court, so far as it directed a sale of property to pay plaintiff's judgment, is affirmed, and, so far as it released the property not attached, is reversed, and the attached property is directed to be first sold and if insufficient to pay the costs of this action and the decree, then the other premises mentioned in the seventh finding of the referee, or so much thereof as

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may be necessary for the purpose, be sold, and the proceeds so applied.

JUDGMENT ACCORDINGLY.

AUGUST RUNQUIST V. ANNA S. ANDERSON.

FILED MAY 21, 1902. No. 11,847.

Commissioner's opinion, Department No. 1:

1. Instructions: OBJECTION EN MASSE. Objections to instructions *en masse* will not be considered where any of those so complained of, are correct.
2. Instruction: REDELIVERY BOND: ESTOPPEL. Instruction that the giving by plaintiff, as surety, of a redelivery bond for property levied upon, does not of itself estop her from maintaining, after its return and a vain demand for it, an action for its conversion by the execution creditor approved.
3. No Plea of Estoppel: NO OFFER TO SHOW KNOWLEDGE: EVIDENCE. Where no estoppel on that ground is pleaded, and no offer made to show knowledge by the wife at the time of the facts, it is not error to refuse evidence that the debt for which property was levied upon, was contracted through faith on the creditor's part in the husband's ownership of the property in question.
4. Purchaser: SUBSEQUENT STATEMENTS. Mere subsequent statements by a purchaser at execution sale, are not competent proof of facts stated as against one suing for conversion by such sale of the property sold.

ERROR from the district court for Polk county. Tried below before SORNBORGER, J. *Affirmed.*

John Tongue, for plaintiff in error.

King & Bittner, contra.

HASTINGS, C.

This is an action for conversion, brought by the wife of an execution debtor against the execution creditor, who procured a levy and sale of personal property. Complaint

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is made of certain instructions to the jury given and refused; that the verdict is not sustained by sufficient evidence; that the evidence shows an estoppel on the plaintiff's part to claim the property in question by reason of her conduct after the levy in connection with giving a redelivery bond to the officer; and, finally, certain refusals of evidence by the trial court are urged as being fatally erroneous.

The complaint, *en masse*, as to the giving of eight instructions, and in the same way as to the refusal of four instructions, need not be considered. In each batch are some, at least, which were proper. Under the repeated rulings of this court, if any of those refused should not have been given, the action of the court must be affirmed, and the same is true as to the eight given by the court. The district court held, and instructed the jury, that the signing of the redelivery bond of itself would not estop the plaintiff from claiming title to the property after its return to the officer who had levied upon it. No exception appears to the giving of any of the instructions in which this is stated, except instruction 13. The giving of this instruction is expressly complained of in the petition in error, and it was expressly excepted to at the time it was given. It contains, as before stated, the district court's conclusion that the giving of the redelivery bond of itself would constitute no estoppel against plaintiff's claiming title in the property after its return to the officer. This is apparently the main legal question in the case. We are not cited to any holding that the recitals in this bond would prevent the assertion of title by the plaintiff to the property after the bond had been complied with and the property returned. In *Cooper v. Davis Mill Co.*, 48 Nebr., 420, a number of cases are cited to the proposition that such a bond would not create such an estoppel, but it is expressly declared that this question does not arise in that case, and is not decided. Counsel for the defendant says that the question has not been decided in this state. In *Hilton v. Ross*, 9 Nebr., 406, the giving of such a redelivery

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bond is held not to estop the defendant from questioning the validity of the seizure and moving to dissolve the attachment. This conclusion is reaffirmed in *Wilson v. Shepherd*, 15 Nebr., 15. The cases cited with apparent approval by this court in *Cooper v. Davis Mill Co.*, 48 Nebr., 424, from other states, hold that the surety on such a bond may, by appropriate action, set up title in himself after the property has been restored to the officer. We are satisfied with the soundness of this doctrine and the correctness of the trial court's conclusion that the redelivery bond of itself did not estop plaintiff from claiming title. It is thought that there was no prejudicial error in the giving or refusing of instructions.

The evidence seems to have been sufficient to have supported even a larger verdict than plaintiff recovered, but the jury were warranted in concluding that the property was really bought in for the most part by the husband's brother, and for plaintiff and her husband's use. The woman, in truth, seems to have been simply given a verdict for one cow's value, and the evidence clearly showed her placing of one cow on the farm.

The evidence offered that defendant loaned money to plaintiff's husband on the faith of the latter's ownership of the property in question was rightly refused. No offer was made to connect the plaintiff with the transaction. The only issues were whether or not the property belonged to the plaintiff, and whether or not she was estopped from claiming it by the redelivery bond and the circumstances of its execution. No estoppel by reason of permitting her husband to get credit on the strength of ownership of her property was alleged, and the facts of these negotiations between defendant and her husband, which were not offered to be connected with her, had no bearing on the questions at issue. The same is true, with the addition that the whole matter was still more remote, as to proposed evidence of conversations of defendant with Axel Anderson, the purchaser of the property at the execution sale. Quite possibly the statements of Axel Anderson were as to

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things which would have tended to disprove plaintiff's ownership, but, if so, his statements out of court to the defendant had no place at the trial. His knowledge, if desired, should have been put in through his own testimony. His statements are not declarations as to title, made by an owner, but are merely as to the conducting of the sale, held at defendant's instance.

It is recommended that the judgment of the trial court be affirmed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

BYRON E. INGLEHART V. LYMAN C. LULL ET AL.*

FILED MAY 21, 1902. No. 11,663.

Commissioner's opinion, Department No. 1.

1. **Appeal from a Justice of the Peace: SAME ISSUES: NEW MATTER.**
Where an appeal is taken from a judgment of a justice of the peace to the district court, the case is to be tried in the latter court upon the same issues that were presented in the court from which the appeal was taken, with the exception of new matter arising after the trial.
2. **Transcript: FAILURE TO DISCLOSE ISSUES: PAROL EVIDENCE.**
Where the transcript from the justice court filed in the district court on appeal fails to show what issues were tendered in the justice court, parol testimony is admissible to show what issues were presented.

ERROR from the district court for Douglas county.
Tried below before BAXTER, J. *Affirmed.*

Brome & Burnett, for plaintiff in error.

Richard S. Horton, contra.

*Rehearing allowed. Former opinion adhered to. Opinion filed May 20, 1903.

DAY, C.

On February 4, 1899, Lull and Skinner recovered a judgment before a justice of the peace in and for Douglas county against Byron E. Inglehart, as indorser and guarantor of a promissory note which had been assigned to the plaintiff. From this judgment Inglehart appealed to the district court, where, upon trial, judgment was again rendered against him. To review this judgment he brings the case to this court by proceedings in error.

The petition of the plaintiffs in the district court contains the necessary averments to state a cause of action. The defendant's answer admitted the indorsement of the note and the delivery thereof to the plaintiffs, but by way of defense alleged, in paragraphs two and three, two defenses, one pleading payment and the other laches. On motion of the plaintiffs the court struck from defendant's answer paragraphs two and three, upon the sole ground that the issues thus sought to be tendered were not presented in the court below. This ruling of the court presents the only question we are asked to review. The rule is now well settled in this state that where an appeal is taken from a county court or a justice of the peace to the district court, the case is to be tried in the latter court upon the same issues that were presented in the court from which the appeal was taken with the exception of new matter arising after the trial. *Darner v. Daggett*, 35 Nebr., 695; *Baier v. Humpall*, 16 Nebr., 127; *O'Leary v. Iskey*, 12 Nebr., 136; *Fuller v. Schroeder*, 20 Nebr., 631; *Bishop v. Stevens*, 31 Nebr., 786; *Robinson v. Buffalo County Nat. Bank*, 40 Nebr., 235; *Levi v. Fred*, 38 Nebr., 564; *Cobbey v. Buchanan*, 48 Nebr., 391; *Halbert v. Rosenbalm*, 49 Nebr., 498; *Bellamy v. Chambers*, 50 Nebr., 146. The transcript of the record from the justice court, filed in the district court, did not disclose what issues were tendered before the justice. It contains the simple recital of the "appearance" of the defendant, followed by a judgment for the plaintiffs in the usual form. The record

brought to this court contains no bill of exceptions, so that it must be presumed that sufficient evidence was before the court to sustain its finding, if it be determined that it was competent for the court to hear testimony *aliunde* of the record to show what issue was in fact presented in the justice court. It is urged by counsel for the defendant that where a party on appeal alleges that the issues are different from those presented in the court from which the appeal is taken, he must establish that contention by the record, and can not do it in any other way. We do not wholly agree with this contention. If the record from the justice court had disclosed what issues were presented in that court, then it would have been repugnant to a familiar rule of evidence to receive parol proof to contradict the record. But where, as in this case, there is uncertainty in the record as to whether precise questions were raised and determined in the former trial, it is competent to supplement the record by extrinsic evidence. Counsel for defendant cite the case of *Cobbey v. Buchanan*, 48 Nebr., 391, as decisive of the question that the record is the only evidence to be considered in determining what issues were tried in the lower court. An examination of that case will disclose that it does not sustain the contention made for it. In that case a motion was made to strike certain paragraphs of the defendant's answer, upon the ground that new issues were sought to be tendered by it. There was no evidence by affidavit or otherwise to support this contention. The transcript of the record from the lower court to the district court simply showed an "appearance" of the defendant. Upon the facts thus presented this court very properly held, that the defendant was not required in the lower court to file an answer; that he was at liberty in the lower court to interpose any defense he saw fit; and, for aught that was disclosed by the record, he did interpose before the lower court the defenses sought to be stricken out on the appeal. In that case the district court refused to strike the paragraphs assailed because there was no evidence that the issues tendered were different from those

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presented in the lower court. In the case at bar there was evidence which we must presume was sufficient, in the absence of a bill of exceptions, to show that the issues tendered by the answer were different from those presented in the court below.

We therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

THEODORE STANISICS V. AMANDA E. MCMURTRY ET AL.

FILED MAY 21, 1902. No. 11,763.

Commissioner's opinion, Department No. 1.

Action: GRANTEE OF DEED: BREACH OF COVENANT: PAROL EVIDENCE: CONTEMPORANEOUS PAROL AGREEMENT: TAXES. In an action by a grantee of a deed against his grantor to recover for a breach of covenant against incumbrances, parol evidence is inadmissible to show that taxes were, by contemporaneous oral agreement, excepted from the terms of the deed.

ERROR from the district court for Lancaster county. Tried below before CORNISH, J. *Reversed.*

Halleck F. Rose, Charles O. French, M. M. Alexander and Charles O. Whedon, for plaintiff in error.

Allen W. Field and Guy A. Andrews, contra.

DAY, C.

The plaintiff brought this action in the district court of Lancaster county against the defendants to recover for a breach of a covenant against incumbrances contained in a deed executed by the defendants to the plaintiff. The trial

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resulted in a judgment for the defendants, to review which the plaintiff brings error to this court.

The record shows that on July 16, 1896, the defendants conveyed to the plaintiff by warranty deed certain real estate situated in the city of Lincoln, Nebraska. The deed contained the following covenant: "And we do hereby covenant with said Theodore Stanisics and his heirs and assigns that we are lawfully seized of said premises; that they are free from incumbrance, except taxes for the year 1896, and paving assessments for subsequent years; that we have good right and lawful authority to sell the same, and we do hereby covenant to warrant and defend the title to the said premises against the lawful claims of all persons whomsoever." The testimony is undisputed that at the date of the execution of the deed, certain taxes against the lands were unpaid which were valid and subsisting liens upon the premises, and that subsequent to the execution of the deed and prior to the commencement of this action, the plaintiff paid the said taxes for the years and in the amounts as shown by the following items:

County taxes for the year 1895.....	\$169 45
City taxes for the year 1895.....	93 25
Special assessment for street paving for the year	
1890	13 45
Special assessment for street paving for the year	
1888	18 55
City taxes for the year 1893.....	295 00

The plaintiff alleged in his petition that he had been paid on account the sum of \$276.75, leaving a balance unpaid in the sum of \$308.45, for which, with interest, he prayed judgment. The defendants' answer alleged that the deed was made and delivered to the plaintiff with the understanding and agreement between the parties that, upon the payment by the defendants to the plaintiff of \$300, that the plaintiff would immediately pay off and discharge all of the taxes due upon said lands; that defendants paid to the plaintiff the said sum of \$300 in full performance of the agreement, and received from the plain-

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tiff a receipt in writing, as follows: "Lincoln, Neb., July 20, 1896. Received of A. E. McMurtry amount of taxes on lot D and two feet of E. Theo. Stanisics." The answer also alleged that the defendants executed the deed and paid said sum of money, relying upon the agreement of the plaintiff to pay and discharge all of the taxes upon said property; that by reason of the premises the plaintiff is estopped to claim or demand any sum or sums from the defendant. The reply denied the making of the agreement alleged in the answer; denied the payment of \$300; and alleged affirmatively that the amount paid by the defendants on account of the taxes was intended to cover certain specific items of taxes, which were then represented by the defendants to include all of the unpaid taxes assessed upon said premises; that the receipt mentioned in the answer was issued subsequent to the payment of said sum of money for the purpose of giving written testimony of the sum so paid; that the plaintiff had not learned at the time of giving said receipt that the city taxes for the year 1893 were unpaid, and relied upon the statement of the defendants that the sum paid by them to plaintiff was sufficient to pay off and discharge all taxes assessed against said lands. It also appears from the testimony that the plaintiff, immediately prior to the execution of the deed, had obtained from the city treasurer and the county treasurer a statement of the unpaid taxes due upon said premises. These statements disclosed that there was due and unpaid:

County taxes for 1895	\$168 55
City taxes for 1895	89 65
Paving taxes, 11th street	18 55
Paving assessments, M street	12 70

By some mistake or inadvertence the city taxes for the year 1893, amounting to \$295, were omitted from the statement, though at the time they were due and unpaid. When the parties met for the purpose of consummating their negotiations for the sale of the property, the statements above described were produced and the defendants then claimed that they had paid the item of paving taxes,

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amounting to \$12.70. This sum was accordingly deducted, leaving a balance of \$276.75, which the defendants then paid to the plaintiff. Some months later the plaintiff discovered that the city taxes for 1893 had been omitted in the statement furnished by the city treasurer of the amount of taxes due upon the lands. The evidence of the defendants tended to show that, by agreement of the parties, the plaintiff was to receive \$276.75 in full payment of all taxes due upon the premises. This agreement appears to have been cotemporaneous with and a part of the negotiations leading up to the execution of the deed, although the payment of the amount was not made until after the delivery of the deed. This testimony of the defendants was received over the objection of the plaintiff, and is one of the errors now complained of. We think the objection was well taken. It is an old and thoroughly established rule of evidence that parol testimony can not be received to contradict, vary, add to or subtract from the terms of a valid written instrument. This rule and the exceptions thereto are so thoroughly established, and so well recognized, as to need no authority to support it.

This principle was applied in the case of *McClure v. Campbell*, 25 Nebr., 57, involving the same features as the case now under consideration. That was an action to recover the amount of taxes paid by a vendee under a deed containing a covenant of warranty against incumbrances. The defendant admitted the amount of the taxes due, but alleged an oral agreement made with the plaintiff prior to the execution of the deed by the terms of which the plaintiff was to pay the taxes. The court, after citing sections of the statutes relating to the time when taxes become a lien upon real estate, said: "The defendant, therefore, would be liable for the taxes for the year 1882, independently of the covenants in his deed, unless there was an agreement on the part of the plaintiff to pay them, but a parol agreement on the part of the plaintiff, even if established, could not be used to contradict the covenant in the deed. What the effect might be in an action to reform

the deed, is not now before the court. Taxes upon real estate date from the first day of April of each year, and become an incumbrance upon the land from that time. A party, therefore, who desires to except the taxes from his covenant against incumbrances should do so in writing in the deed. It is very clear that parol evidence of what took place before the making of the deed is not admissible to contradict the covenants therein." It is also well established that when the parties to a contract have reduced it to writing the law presumes that all previous and contemporaneous negotiations and conversations are merged into the contract, and it can not be varied by parol testimony. *Hamilton v. Thrall*, 7 Nebr., 210; *Dodge v. Kiene*, 28 Nebr., 216; *Watson v. Roode*, 30 Nebr., 264.

In *MacLeod v. Skiles*, 81 Mo., 595, 603, the court said, "This suit brings us to a consideration of the question whether it is competent for a party, as in this case, to accept a deed for real estate with an express covenant therein to warrant and defend the title thereof against the claim of every person whatsoever, save and except the taxes of 1877, and then turn around and show that the covenantor, by a contemporaneous parol contract agreed to pay the taxes, thus expressly excepted by the written contract in the deed so accepted. It is elementary law that upon the execution, delivery, and acceptance of a deed, or written instrument, all prior or contemporaneous parol stipulations are merged in the deed or writing and can not afterward be set up to contradict or vary the same. It is scarcely necessary to refer to elementary authority or adjudged cases to establish so plain and recognized a doctrine as this." *Long v. Moler*, 5 Ohio St., 271, 272; *Van Wagner v. Van Nostrand*, 19 Ia., 422; *Harlow v. Thomas*, 15 Pick. [Mass.], 66; *Gilbert v. Stockman*, 76 Wis., 62.

It was within the power of the parties at the time of entering into the contract to have engrafted into the covenant of the deed an exception of taxes, if such had been their intention. The parties may have had such an agreement resting in parol, but this we can not know, because

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parol evidence is inadmissible to vary or contradict the plain provisions of the deed. What the effect might be in an action to reform the deed is not now before us. Other questions are discussed in the briefs, but, as we view it, the question above considered is decisive of the case.

We therefore recommend that the judgment of the district court be reversed and the cause remanded.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded.

REVERSED AND REMANDED.

PHILLIP H. BENDER V. KINGMAN & COMPANY ET AL.

FILED MAY 21, 1902. No. 9,810.

Commissioner's opinion, Department No. 1.

1. **Debtor: TRANSFER OF PROPERTY: INTENT TO DEFRAUD: PROTECTION: CONSIDERATION.** Where a debtor transfers his property with intent to defraud his creditors, a purchaser from such debtor will be protected only to the extent of the consideration with which he has parted before receiving notice of the fraudulent intent of his grantor.
2. **Testimony: CONVERSATIONS.** Admission of testimony regarding conversations had in the presence of the purchaser of a fraudulent vendor pending the transfer of the property, charging him with notice of the fraudulent intent of his vendor, held not error.
3. **Constructive Fraud.** The doctrine of constructive fraud does not obtain in this state, as by virtue of section 20, chapter 32, Compiled Statutes, the question of fraudulent intent is made a question of fact, and not of law.
4. **Fraudulent Intent: STATUTE: QUESTION OF FACT: DIRECTION OF VERDICT.** Fraudulent intent, declared to be a question of fact by statute, does not differ in kind or degree from other questions of fact; and when the evidence adduced in a case upon the question of fraudulent intent is so conclusive that reason-

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able minds can not differ as to the conclusion to be drawn therefrom, it is not error for the court to direct a verdict accordingly.

5. Evidence. Evidence examined, and held that a peremptory instruction given by the trial court was properly given.

ERROR from the district court for Thurston county. Tried below before EVANS, J. Rehearing of case reported in 62 Nebr., 469. *Reaffirmed.*

George G. Bowman, Mell C. Jay and R. G. Strong, for plaintiff in error.

James H. McIntosh, contra.

KIRKPATRICK, C.

This is a replevin action brought in the district court of Thurston county by Phillip H. Bender, plaintiff in error, against Kingman & Co. and John H. Mullen, defendants in error. Mullen was the sheriff of Thurston county, and had levied upon a stock of goods under writs of attachment issued in suits brought by Kingman & Co. against Weiser Bros., and in the action plaintiff in error obtained possession of the stock of goods claiming to be the vendee of Weiser Bros. An opinion was filed in this case July 10, 1901 (62 Neb., 469.) On application of plaintiff in error a rehearing was allowed, and the case is again presented for consideration.

The facts and circumstances with respect to the transfer to Bender by Weiser Bros. are set out somewhat at length in the opinion of this court in the case of *Kingman & Co. v. Weiser Bros.*, reported in 48 Nebr., 834, and no further statement of such facts need be made herein. The trial court directed a verdict for defendants in error, and such action and the rulings of the court upon the admissibility of certain evidence, are assigned as error in this proceeding.

The first contention of plaintiff in error is that the court erred in admitting in evidence conversations had between

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two witnesses who were called by defendants in error and Weiser Bros. It is disclosed by the evidence that these conversations were had in the hardware store during the progress of the inventory being taken of the goods which plaintiff in error had purchased from Weiser Bros. The evidence discloses that at that time plaintiff in error had parted with no consideration for the goods. Certain papers had been drawn up and deposited in the bank at Pender in escrow, to be held until the invoice was completed, so as to ascertain the value of the goods, to determine for what amount plaintiff in error should execute his notes to Weiser Bros., in addition to a contract for the purchase of certain lands which he had or was to assign. This testimony was undoubtedly admitted for the purpose of showing that plaintiff in error had full knowledge of the fraudulent intent of Weiser Bros. in making the sale before he had parted with any consideration. His duty upon having this knowledge brought directly home to him was immediately to stop further proceedings, and by proceeding with the transfer, and by surrendering his papers and giving his notes with full knowledge of the fraud of Weiser Bros., he became a party to such fraud. *Hedrick v. Strauss*, 42 Nebr., 485; *Karll v. Kuhn*, 38 Nebr., 539, 540; *Temple v. Smith*, 13 Nebr., 513, 514. This evidence was clearly admissible for the purpose of showing the knowledge of plaintiff in error of the fraud which Weiser Bros. were about to perpetrate on their creditors, and its admission was not error.

The next contention of plaintiff in error is that the court erred in directing a verdict for defendants in error. This contention is based upon two grounds: (1) that the evidence was not sufficient to establish fraud; that, in any event, it was not a case in which the evidence was of such a conclusive character that reasonable minds could not differ, and therefore was a case which must have been given to the jury; and (2) that under the statutes of this state, the question of fraudulent intent must necessarily be submitted to the jury for determination.

Regarding the first point, it is sufficient to say that from an examination of the evidence we are led to the conclusion that it is of such a character that had the question been submitted to the jury, and a verdict returned for plaintiff in error, it would have been the duty of the court to set such verdict aside. This being true, it was not error for the trial court to direct a verdict for defendants in error, unless, under the statutes of this state, the question of fraudulent intent must necessarily be submitted to the jury for determination. The answer to this question depends upon a construction of section 20, chapter 32, Compiled Statutes, 1899, which is in the language following: "The question of fraudulent intent in all cases arising under the provisions of this chapter shall be deemed a question of fact, and not of law, and no conveyance or charge shall be adjudged fraudulent, as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration." Difficulties in arriving at the true import and meaning of language employed in a statute may sometimes best be removed by reference to the conditions prevailing at the time, and with reference to which the legislature enacted the statute regarding the purpose and meaning of which uncertainty may exist. The contention of plaintiff in error, in effect, is that by reason of the statute quoted the question of fraudulent intent, in every case tried to a jury, must be submitted to the jury for determination, and that this is so, even though the evidence establishing a fraudulent intent is so conclusive that reasonable men could draw but one conclusion therefrom, and that it is not within the power of the court to resolve the question into one of law and direct a verdict. The correctness of this contention is the question requiring determination.

Our section above quoted is identical in phraseology with the provision of the statute of frauds of the state of New York. Michigan and other states have provisions substantially the same. Before the enactment of the New York statute, the courts of that state, following the Eng-

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lish cases, recognized a two-fold classification of fraud, namely, actual fraud and constructive fraud. Actual fraud is defined by an eminent writer as that where a party intentionally or by design misrepresents a material fact, or produces a false impression, in order to mislead another or to obtain an undue advantage. In every such case, there is a positive fraud in the truest sense of the term. There is an evil act with an evil intent. 1 Story, Equity Jurisprudence, sec. 192. But constructive fraud was recognized as having an actual, potential existence in the absence of all fraudulent intent. Contracts, although not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, but having a tendency to deceive or mislead other persons, violate private or public confidence, or impair or injure public interests, were deemed equally reprehensible with positive fraud, and were therefore prohibited as within the same reason and mischief as acts and contracts done *malo animo*. 1 Story, Equity Jurisprudence, sec. 258.

In the case of *Reade v. Livingston*, 3 Johns. Ch. [N. Y.], 481, 500, decided in 1818, before the enactment of the New York statute (our section 20), Chancellor Kent said: "The conclusion to be drawn from the cases is, that if the party be indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts, and no circumstance will permit those debts to be affected by the settlement, or repel the legal presumption of fraud. The presumption of law, in this case, does not depend upon the amount of the debts, or the extent of the property in settlement, or the circumstances of the party. * * * I should rather conclude, that the fraud in the voluntary settlement was an inference of law, and ought to be so, as far as it concerned existing debts; but that, as to subsequent debts, there is no such necessary legal presumption, and there must be proof of fraud in fact." *Freeman v. Pope*, 5 Ch. App. Cases [Eng.], 536.

In *Hamilton v. Russell*, 1 Cranch [U. S.], 309, it is said: "The want of possession [in the grantee] is not

merely evidence of fraud, but is a circumstance *per se* which makes the transaction fraudulent in point of law." *Sturtevant v. Ballard*, 9 Johns. [N. Y.], 339.

It is apparent to us that it was for the purpose of abolishing and avoiding legal presumptions of fraud as recognized in the foregoing cases that section 20 of our chapter 32 and similar provisions in other states were enacted.

In the case of *Babcock v. Eckler* (decided by the court of appeals of New York), 24 N. Y., 623, Sutherland, J., commenting upon the case of *Reade v. Livingston*, *supra*, said: "Subsequently, by section 4, title 3, chapter 7* [our section 20], it was declared that the question of fraudulent intent, in all cases arising under the provisions of that chapter, should be deemed a question of fact * * *. The question in this case arises under the provisions of this chapter of the Revised Statutes, which treats 'of fraudulent conveyances and contracts, relative to goods and chattels and things in action.' No decision or series of decisions, then, can make the question of fraud in this case a question of law, or establish that there is a legal presumption of fraud from the facts and circumstances found by the referee; for the statute declares that the question of fraud shall be deemed a question of fact, and by declaring it to be a question of fact, in effect declares that there is no such legal presumption."

The doctrine of constructive fraud seems to have been based in a principle of preventive justice, seeking to do away with the possibility of fraud by a declaration that certain acts and contracts, whether accompanied by fraudulent intent or not, shall be fraudulent and void. In some cases actual fraud was repelled. *Bowes v. Heaps*, 3 Ves. & B. [Eng.], 117, 119.

From an examination of the growth of the law upon the subject of fraud, it would seem that at first the intent was a conclusive presumption of law from many particular circumstances; next, a rebuttable presumption of law from a variety of circumstances; and, lastly, it was by statute

* 2 Revised Statutes (1875), 137.

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required to be inferred as an argumentative conclusion of fact without the aid of any legal presumption. What was the design and effect of the statute under consideration? Simply this, and as we conceive it, no more: to declare that no contract shall be declared void for fraud except upon proof of fraud in fact. It is the same as if the legislature had said the doctrine of constructive fraud is hereby abrogated, and henceforth the courts shall take cognizance only of actual fraud, fraud as a fact to be alleged and proved as other facts, instead of being judicially deduced as a conclusion of law from certain given facts and circumstances. Fraud being a question of fact, and never the result of legal presumption, is it necessary to be submitted to the jury for determination, even in cases where the proof as to fraudulent intent is so strong and overwhelming that reasonable men can not come to different conclusions? It is difficult for us to see why the statute should be given such construction. If the interpretation already given to the statute is correct, to so construe it would be to do violence to the intent of the law-framers. The statute says that the question of fraudulent intent shall be deemed one of fact. It does not say that it shall be deemed a question of fact for the jury. And, though it did, the obstacles in the way of holding that the jury's verdict in a jury trial can alone determine the existence of a fraudulent intent, would not be more easily overcome.

As an elementary proposition, in jury trials, it is for the court to decide questions of law, and the jury to decide questions of fact. But it will readily be admitted that, under our law and the decisions of this court, all ordinary material questions of fact can be submitted to the jury only when the evidence would warrant a finding either way. If a finding in any other but one way would be clearly and manifestly against the evidence, or in conflict with all the evidence, it would be set aside, and in such case it is the duty of the court to determine in advance of submission the status of the proof, and withdraw from the consideration of the jury any question regarding which

there is no conflict. But a peremptory instruction by the court does not violate the rule that questions of fact are exclusively for the jury, or make facts alleged and proved questions of law in the sense in which the construction of a written instrument is a question of law. Peremptory instructions are not only permissible, but mandatory, when the evidence would not warrant another verdict than that directed.

Does the statute under consideration make an exception to this rule of cases of fraudulent intent? So far as the rules of evidence are concerned, it seems to be well established by authority that no higher or greater degree of proof is required to establish fraudulent intent than other material facts. In civil cases, a preponderance of the evidence is all that is required. *Reed v. Noxon*, 48 Ill., 323; *Carter v. Gunnels*, 67 Ill., 270. It is true that proof of fraud must be clear and explicit, and the inference of fraud can not be based on mere suspicion; but this does not make fraudulent intent a question of fact different in kind and degree from other questions of fact. Wherever fraudulent intent is a material part of a plaintiff's case, without an allegation of such intent, he fails to state a cause; without proof, he can not recover.

By the statute fraudulent intent is made a question of fact. But, manifestly, the question of fact to decide which is the province of the jury must be a question that arises from the evidence. By a question arising from the evidence can be understood only a question regarding which there is sufficient evidence pro and con to warrant a finding one way or the other. It can not be a conceded fact, nor yet a fact regarding which there can be no reasonable dispute. And if fraudulent intent, declared by statute to be a question of fact, is, in a case tried to a jury, so conclusively shown by the evidence that all reasonable and unbiased men must believe it to exist, the case becomes one in which it is proper for the court to direct a verdict.

To accept the construction contended for, would involve the adoption of a distinct procedure in the trial of cases

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involving fraudulent intent. If the question, as a matter of necessity, must always be submitted to the jury, it follows as a corollary that the return of the jury, no matter how erroneous or inconsistent with the evidence, must be final; or if not final, and the court has the right to set aside the verdict as clearly wrong, the question must needs be again submitted to another jury, with a possible like result. Thus there would be one procedure for questions of fraud, and another for other questions of fact. This could not have been the intention of the legislature, and it is not the law. A fact is a fact wherever met, and the only purpose of the statute was to provide that fraud, like other facts, should be pleaded, proved and found as a fact, and not drawn as a presumption of law from other established facts without regard to the intent of the parties participating in the transaction.

The conclusion here reached in no way conflicts with the prior decisions of this court. The case of *Monteith v. Bax*, 4 Nebr., 166, principally relied on by plaintiff in error to sustain his contention, involved the question of the intent of Adam Bax to defraud his creditors by transferring valuable personal property to his wife. The court below refused to submit the question of fraud to the jury, directing a verdict on the theory that the transfer was not fraudulent. In the opinion by this court the evidence adduced at the trial was set out with sufficient detail to show that the transfer was tainted with fraud as against the creditors of the transferrer, and, as that was the real question raised and to be determined in the case, it was held that the court below should have submitted the question of fraud to the jury as one of fact to be determined from all the evidence. But after a careful examination of that opinion we can not find in it any authority for assuming that had the evidence wholly failed to raise any question of fraudulent intent the judgment would still have been reversed, but, on the contrary, reversal was necessary because of the presence of evidence conflicting with the verdict directed by the court. Nor can we find anything in that opinion in con-

flict with the conclusion to which we have already come, that, when the evidence shows conclusively either that there was or was not fraudulent intent it is not error for the court to direct a verdict. *Oliver v. Eaton*, 7 Mich., 108, 113, cited in *Monteith v. Bax*, *supra*, determines a like question.

In the case of *Hedman v. Anderson*, 6 Nebr., 392, cited by plaintiff in error, it is held: "A mortgage of goods and chattels, with possession and power of sale in the mortgagor, is void as against his creditors." In the opinion, after showing that fraudulent intent must ordinarily be established by circumstantial evidence, it is said: "But the questions as to the existence of facts showing a fraudulent intent are alone for the jury to determine and not for the court. If, however, certain facts are conceded to exist, the question of their sufficiency to indicate a fraudulent intent becomes a question of law which the court must determine. But the question of the credibility of witnesses rests entirely with the jury." In that case but three things are determined,—that a mortgage fraudulent upon its face must be so pronounced by the court; that, where conceded facts show fraud, it is for the court so to instruct the jury; and that, where there is a question in fact as to the existence of a fraudulent intent, such question, with the credibility of the witnesses, is for the jury.

In *Williams v. Evans*, 6 Nebr., 216, it is said: "If the instrument on its face is one the law will not sanction as against creditors, it is the duty of the court to pronounce it fraudulent as to them"; but, "where an instrument is not void upon its face the question of fraudulent intent is a question of fact which should be submitted to the jury," thus following the rule that where there is a question of fact about which reasonable minds might differ the case is one for the jury. *Connelly v. Edgerton*, 22 Nebr., 82, and *Davis v. Scott*, 22 Nebr., 154, are to the same effect, and contain nothing contrary to the rule which we have announced in this case.

A critical examination of the cases cited by plaintiff

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in error will show that various courts, having in mind that fraudulent intent was a question of fact and not a presumption of law, and in attempting to make clear that distinction, have made use of expressions which would seem to support the contention of plaintiff in error. But so far as they have any bearing upon the question, they are cases in which the question of fraudulent intent was a disputed question, arising from the evidence, and should be submitted to the jury. No case has been cited, and we believe none can be found, which holds that where fraudulent intent is conceded, or where the evidence establishing it is of such a conclusive character that reasonable minds could not differ in their conclusions, the question must still be submitted to the jury for determination. It is the settled rule in this state that where the evidence is uncontradicted, and all reasonable men must draw the same conclusion therefrom, it is not error for the court to direct a verdict in favor of the party entitled thereto, under the pleadings and proof. *Elliott v. Carter White-Lead Co.*, 53 Nebr., 458. In the case at bar the evidence showing fraudulent intent being without substantial conflict, and of such a character that reasonable men would not differ as to the conclusion to be drawn therefrom, it was not error for the court to direct a verdict for defendants in error.

No error appearing in the proceedings of the trial court, the former opinion is adhered to.

HASTINGS and DAY, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the opinion heretofore rendered by this court, affirming the judgment of the district court, is adhered to.

AFFIRMED.

UNION PACIFIC RAILROAD COMPANY, APPELLANT, v. COUNTY
OF CHEYENNE ET AL., APPELLEES.

FILED MAY 21, 1902. No. 10,738.

Commissioner's opinion, Department No. 1.

1. **Injunction:** ILLEGAL TAXES. Injunction will not lie to restrain the collection of taxes, unless such taxes are levied for an unauthorized or illegal purpose.
2. **Facts.** Under the facts in this case, *held*, that the taxes, the collection of which is sought to be restrained by injunction, are not illegal or unauthorized.

APPEAL from the district court for Cheyenne county.
Heard below before GRIMES, J. *Affirmed.*

E. P. Smith (W. R. Kelly, of counsel), for appellant.

H. E. Gapen, contra.

KIRKPATRICK, C.

This is a suit brought by the Union Pacific Railroad Company against Cheyenne county, the county commissioners, the county treasurer and the county clerk, for the purpose of enjoining the collection of a certain portion of the levy for bridge fund made by such county in the year 1898. A petition was filed which, among other things, pleaded that the board of county commissioners, on the 14th day of January, 1898, duly made an estimate of the necessary running expenses of Cheyenne county for the year 1898, one item of which estimate was the sum of \$6,000 for repairs and building of bridges; that the county commissioners, on the 15th day of February, 1898, made an order to the county treasurer, which was duly entered upon the records of the county board, and acted upon by the treasurer, transferring the sum of \$1,200, then in the county bridge fund, to the county general fund; that on the 23d day of June, 1898, the county board made another order directing the county treasurer to transfer an

additional sum of \$800, then in the bridge fund, to the general fund of the county, which order was also acted upon by the treasurer. These two items, aggregating \$2,000, were an unexpended balance in the bridge fund remaining of the levy for the year 1897. It also appears that the levy for the general fund for the year 1897 had been exhausted. The county board, on June 22d, 1898,—the last day of its session as a board of equalization,—made the levy of county taxes for that year, and among the items so levied was a levy of four mills for bridge fund. The entire levy of the county for that year was within the fifteen-mill limit provided by the constitution and laws of the state. It is further alleged that the total valuation of the taxable property in the county for the year 1898 was the sum of \$1,158,840, and that there would be realized from the levy of four mills thereon the sum of \$4,635.36; that the assessed valuation of the property of the railroad company in the county was the sum of \$404,348, and that the bridge fund levy of four mills thereon would produce the sum of \$1,617.39. It is alleged that the \$2,000 hereinbefore mentioned was illegally and improperly transferred from the bridge fund to the general fund, and that, if said sum had remained in the bridge fund, it would only have been necessary to levy a bridge fund of 2.3 mills on the dollar, and that in making a levy of four mills the county board made an illegal and excessive levy of 1.7 mills, which, upon the valuation of the property of the railroad company, would produce the sum of \$687.39, and that the taxes assessed against the railroad company were to that extent illegal and unauthorized. There was a prayer for an injunction, restraining the collection of that portion of the levy claimed to be excessive, and for a decree of the district court, canceling and setting aside and holding for naught the excessive portion of the levy. It was alleged that the railroad company was ready and willing to pay 2.3 mills bridge fund, amounting to the sum of \$973.50, which it admitted was a valid levy, and asked the court to ascertain the amount

which it was justly required to pay. To this petition an answer was filed by appellees, admitting practically all of the allegations of the petition, except such portions as alleged that the transfer of the funds mentioned and in the manner stated, was unlawfully and illegally made, and alleging that the county commissioners had a right to make such transfer of the funds, and that it was made in good faith. The cause was submitted to the court upon the pleadings, no testimony being offered by either party. Upon the filing of the petition a temporary injunction was granted, which, upon the trial of the cause in the district court, was dissolved, and the suit of the railroad company dismissed for want of equity. The cause is brought to this court upon appeal.

The single question requiring determination is whether or not the railroad company can enjoin the collection of a portion of the four-mill bridge fund levied for the year 1898 because of the action of the county board in transferring \$2,000 of an unexpended balance in the bridge fund, derived from the levy of 1897, to the county general fund. From a careful examination of the statute we are constrained to say that the action of the board of county commissioners in transferring the unexpended balance remaining in the bridge fund to the general fund was unauthorized and illegal. *Union P. R. Co. v. Dawson County*, 12 Nebr., 254; *State v. Lincoln County*, 18 Nebr., 283. The statute providing for the transfer of an unexpended balance remaining in a fund to the county general fund probably has no application to balances remaining in funds for which, under the statute, a levy is required each year. There is no county in the state which is not required to make expenditures for the erection and repair of bridges each year, and under the statute a levy is required to be made for such purpose within the limit of four mills for whatever amount is necessary to meet the expenditures for such year. To permit the county to make a levy for the bridge fund in excess of the amount required for the year in which the levy is made with the purpose in view

of transferring the balance to the general fund would be to permit it, by indirection, to accomplish what, by statute, it is prohibited from doing directly. What the remedy of the railroad company in the matter of the transfer of these funds was,—whether it should, by proper proceedings, have required the county treasurer to replace in the bridge fund the moneys transferred therefrom into the general fund, or whether the treasurer should have been required to disregard the order of the board upon the ground that it was void,—can not be determined in this case. The rule in this state is well settled that injunction will lie to restrain the collection of a tax levied or assessed for an unauthorized or illegal purpose. *Chicago, B. & Q. R. Co. v. Nemaha County*, 50 Nebr., 393; *Chicago, B. & Q. R. Co. v. Cass County*, 51 Nebr., 369, 370; *Burlington & M. R. R. Co. v. York County*, 7 Nebr., 487. The rule is also equally well settled that under the provisions of section 144 of chapter 77, article 1, Compiled Statutes, 1899, the courts will not interfere by injunction to prevent the collection of taxes unless such taxes are illegal, or have been levied for an unauthorized purpose. *Hallenbeck v. Hahn*, 2 Nebr., 377; *South Platte Land Co. v. City of Crete*, 11 Nebr., 344; *Chicago, B. & Q. R. Co. v. Klein*, 52 Nebr., 258. In the case at bar, the railroad company has wholly failed to point out anything illegal or unauthorized in the four-mill levy for bridge fund, the collection of which it seeks to enjoin. The county board made an estimate of the amount required for repair and construction of bridges for 1898 in the sum of \$6,000. The amount which would be realized by the four-mill levy, providing all the taxes were paid, would be the sum of \$4,635.36. If we consider the \$2,000 wrongfully transferred from the bridge fund as still remaining in that fund, the total amount in the fund for disposition by the county would be the sum of \$6,635.36. But experience has demonstrated that not all of the taxes levied are paid. This fact was in contemplation by the legislature when it by law provided that but 85 per cent. of the levy could

be drawn upon by the issuance of warrants until such time as there was money in the treasury upon which they might be drawn. If we estimate that 85 per cent. of the \$4,635.36 levied would be collected it would produce \$3,940.05, and to this should be added the \$2,000 wrongfully transferred from the bridge fund, and then the county would have \$5,940.05 for use in the repair and construction of bridges for the year 1898. This would be \$59.95 less than the county board at its January meeting estimated would be necessary for the use of the county during the year. It was, no doubt, the purpose of the legislature, in requiring the county board to make, enter upon the county records and publish an estimate of the necessary expenses of the county during the ensuing year, to give notice to the taxpayers and other persons interested of the amount of taxes to be levied, and if any taxpayer or other person had ground for complaint regarding the levy proposed to be made, either because it was too large, or because it did not provide for payment of obligations which it was the duty of the county to pay, his remedy, whatever its nature, must be invoked before the levy for taxes had been made. It is very clear that a party claiming to be injured could not stand idly by until after the levy for taxes had been made by the county board, and then by injunction seek to prevent the collection of the tax upon other ground than expressly authorized by statute.

It appearing clearly that no valid objection is urged against any portion of the four-mill levy for bridge fund, the trial court was right in dismissing the petition of the railroad company. It is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and DAY, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MALK BRUN, SR., APPELLEE, v. CATHERINE BRUN, APPELLANT.**FILED MAY 21, 1902. No. 11,439.****Commissioner's opinion, Department No. 1.**

1. **Husband: DIVORCE: DEED TO WIFE: CONSIDERATION: INABILITY TO READ OR WRITE ENGLISH: OPTION OF WIFE TO ADMIT OR EXCLUDE HUSBAND.** A husband against whom divorce proceedings had been instituted conveyed a valuable farm upon which the family resided to the wife, relying upon representations that the consideration for the deed was to be a home with his wife, permanent reconciliation, and a life annuity of \$200. The husband could neither read nor write the English language. The deed as finally executed gave the wife the option of receiving the husband into the home, or excluding him upon the payment of the \$200 annuity. *Held*, that the deed could not be upheld.
2. **Public Policy: DEED: HUSBAND AND WIFE: INDEFINITE COHABITATION.** A deed from a husband to wife conveying the farm upon which they both reside, the consideration being a home for the husband and cohabitation for an indefinite period, or exclusion of the husband from the home, at the will of the wife, upon the payment of a \$200 annuity for life, is opposed to sound principles of public policy, as being a contract calculated to bring about a separation which has not yet taken place.
3. **Evidence.** Evidence examined, and found to sustain the findings and judgment of the trial court.

APPEAL from the district court for Cuming county.
Heard below before EVANS, J. *Affirmed.*

Thomas M. Franse, for appellant:

A deed from a husband directly to his wife, may be sustained on equitable grounds, *i. e.*, a valuable consideration. *Smith v. Dean*, 15 Nebr., 432.

When the husband and wife occupy a homestead, the title to which is in the name of the husband, a deed of conveyance from the husband to the wife, signed and acknowledged by him alone, is valid. *Furrow v. Athey*, 21 Nebr., 671.

The discontinuance of a suit for a divorce and the resumption of the marriage relations, are a sufficient and

valid consideration for a conveyance of lands or a promise to pay money. *Reithmaier v. Beckwith*, 35 Mich., 110.

It is no part of the court's duty nor has he the right to inquire into, or act upon, the reasons by which a husband may have been induced to make gifts to his wife. *Orr v. Orr*, 8 Bush [Ky.], 156.

The transaction was not contrary to public policy. *Adams v. Adams*, 43 Am. Rep [N. Y.], 675.

O. C. Anderson, also for appellant.

Phil E. Winter, contra.

KIRKPATRICK, C.

This is a suit brought in the district court for Cuming county on the 26th day of August, 1899, by Malk Brun, Sr., appellee, against Catherine Brun, his wife, appellant. Appellee in his petition set up two causes of action: First, alleging extreme cruelty and abandonment for three years on the part of his wife; and, second, that a certain deed which he had executed and delivered to his wife on April 1, 1895, conveying to her their homestead upon which they lived, was obtained by fraud and coercion, and that the same was contrary to public policy, and for that reason invalid; that his wife and her two grown sons had driven him from his home, and had converted over \$1,700 worth of personal property belonging to him to their own use and benefit, and had ever since excluded him from the use and enjoyment of both his personal property and real estate. Appellant, Catherine Brun, answered, pleading that prior to April 1, 1895, she had commenced an action against appellee, her husband, for a divorce on the ground of extreme cruelty, and had included in that suit a cause of action asking to have the real estate upon which they lived declared to be her property and the title quieted in her, alleging that she was the real owner; that her husband and she had made a settlement of such divorce proceedings, by the terms of which the divorce proceedings were dismissed, and the deed mentioned in her husband's

petition was executed and delivered to her upon the agreement that she should either give her husband a home with her on the place, or in lieu thereof \$200 per annum as long as he lived; that such settlement was freely made, upon a good and valuable consideration, and should be allowed to stand. As to the personal property, she pleaded that soon after the dismissal of the divorce proceedings, she had demanded of her husband that he deliver and turn over to her all the personal property on the place because it really belonged to her, and that in settlement and compromise of this demand, the husband had turned over the personal property to her, and that thenceforth she owned it.

It is clear that appellant's answer fails to state a defense to the cause of action set out in the petition, but as this question is nowhere presented in the briefs, and the case seems to have been tried as though the answer did state a defense, the question will not be considered. Trial was had, which on December 5, 1899, resulted in a finding and judgment for appellee, Malk Brun, Sr., granting him an absolute divorce from his wife, and canceling and setting aside the deed of conveyance to the wife as being against-public policy. The decree also awarded to the wife out of the property of the husband \$2,500 alimony, to be paid when she surrendered the place to him, and reserved for an accounting between the parties certain questions regarding the amount of incumbrances paid by the wife on the property, both real and personal, while in her possession, with which she was to be credited, and the husband was to be charged with \$600 paid him by the wife after he was driven from the home, and with a team of horses which he had received.

No complaint is made by appellant in this court of that portion of the decree granting the divorce, or of any other portion of the decree except the cancelation of the deed of conveyance from appellee to her, and this is the only question to be considered. In order that a correct understanding of the questions involved may be had, we

will state briefly the material facts as disclosed by the record: The parties were married in August, 1882. At that time Catherine Brun was a widow, and had five small children. She was residing upon a homestead which had been the property of herself and deceased husband, which was, some time after her husband's death, sold at sheriff's sale, the purchaser being Malk Brun, Jr., a son of appellee, apparently in trust for appellee, who paid the purchase price, something over \$1,200, from his own funds. The parties lived together on this land until some time in March, 1895. At that time three of the children, daughters of appellant, had married and left home, and her two sons had grown to manhood. The record discloses that some time prior to this there had been a systematic effort to drive appellee from the farm,—an effort carried on by appellant and her two sons. The sons, it seems, had taken possession of the farm, excluding appellee, at that time between sixty-five and seventy years of age, from all participation in its management. Appellant moved her bed upstairs in their house, and refused to cohabit with appellee, or in any way recognize him as her husband. Matters stood in this shape for a considerable length of time, the parties living in a state of continual hostility, and frequent quarrels occurring, when on the 8th day of March, 1895, appellant herein instituted divorce proceedings against her husband, in which she claimed to be the real owner of the land upon which they lived. After considerable difficulty, an agreement seems to have been entered into, which, as nearly as we can determine, provided that Brun should deed the farm to his wife, that she would dismiss the divorce proceedings, take appellee back to their home, and that they should cohabit together, or, in the event she did not permit him to live with her, she was to pay him \$200 per annum during his life. It seems clear that Brun's understanding of the agreement was that he was to live with his wife, they were to cohabit together, she was to recognize him as her husband, and, in addition, she was to pay him \$200 per annum; while

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the wife's understanding of the agreement was that he was to live with her on the farm as long as he treated her well, during which time she was not to pay him the \$200 annuity, but, in the event she could not live with him, then she was to pay him the \$200 annually in lieu of a home. The deed, drawn up and executed by the husband and delivered to the wife, was drawn in accordance with the wife's understanding, and contained, in effect, the alternative provision that she was to cohabit with him as her husband, give him a home upon the place, or, in lieu thereof, pay to him \$200 each year during his life, at her option. After the execution of the deed the parties returned to the farm, and in about a week thereafter the wife claimed that she owned, not only the real estate, but the personal property as well. The personal property appears to have been of the value of \$1,750 or \$2,000. It was not referred to in the deed, and no writing regarding it was entered into, and in the negotiations leading up to the execution of the deed, it was apparently not mentioned by any of the parties. Brun and his wife lived together till the spring of 1896, during which time there was much quarreling and disagreement, the wife claiming both real and personal property; the husband conceding the wife's ownership of the real property, but denying that she owned the personal property. About May 23, 1896, appellant's son, being then about twenty-three years of age, and physically much stronger than appellee, committed a brutal assault upon the latter, striking him and choking him into unconsciousness, when a neighbor interfered. The husband then left the place, and from time to time during the next two or three years returned and demanded to be taken back and given a home, the wife uniformly refusing, and steadfastly insisting that she would never live with him again. Appellee took from the farm a team of horses, and in the years 1897, 1898, and 1899, appellant paid him, in accordance with her version of their agreement, \$200, aggregating a payment of \$600.

The action of the trial court in canceling the deed of conveyance seems to be right for at least two reasons: First, it is apparent from the record that appellee, Malk Brun, at the time he executed and delivered the deed in question, was not aware of its contents. It is disclosed that he could neither read nor write the English language, and could but imperfectly understand it when spoken. The deed was drawn by the county judge, who had no understanding of German, and another officer of the county, who had died before the commencement of this suit, was called in at the instance of appellee to explain the contents of the deed to the latter in German. This was attempted to be done, but it is clear that appellee's understanding of the deed was that it provided for a permanent reconciliation and continued cohabitation with his wife, that he was to have a home with her, and that he was to be paid annually during his lifetime \$200. Instead of carrying out this his manifest intention, the deed provided, in effect, that the wife should take the title to the farm, and in consideration therefor either give him a home with her as her husband, or pay him \$200 annually, this option to be exercised by her at any time she chose. The farm at that time apparently was worth at least \$5,000, and was encumbered not to exceed \$500. The personal property, it appears, was worth nearly \$2,000. Appellee was at the time of this agreement nearly seventy years old, and it is clear that in its execution the minds of the parties never met. The agreement, supposing it to have been understood by both parties at the time, is unconscionable, and no court of equity ought to enforce it. The record discloses that the rental value of the farm was very much in excess of \$200 per year, which appellant, according to her claim, was to pay. It seems to be a case where appellant and her two grown sons conspired to exclude appellee from his own farm, and appropriate, not only the realty, but the personal property as well, to their own use. This court has said that a deed from the husband to the wife, where made upon a valid con-

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sideration, and where equitable grounds exist for upholding it, will be held valid. But in this case no valid ground, equitable or otherwise, seems to exist for holding the deed valid.

But the deed is invalid as against public policy. Assuming as true the contention of appellant, that the agreement actually entered into was as shown by the deed, giving her the option of receiving appellee into the home and cohabiting with him as his wife, or excluding him upon the payment of a \$200 annuity, the contract is clearly bad. Under this construction of the contract it amounts to a transfer of a valuable farm to the wife, upon an alternative consideration. One alternative was that the home should continue to exist, the domestic relations should remain unimpaired, the family be held intact, and the parties to the contract should cohabit as man and wife. The other alternative was the payment of a \$200 annuity to the husband by the wife, to be attended by the breaking up of the home, a severance of the conjugal relations, and the exclusion of the husband from the home. But, further, under the terms of this contract the wife was given the unqualified power to decide at any time when she should exclude the husband from the home and commence payment of the annuity. According to her own testimony, the contract was that he was to live with her as long as he treated her well. But who is to decide when his treatment has become such as both parties to the contract contemplated it must be before she should be entitled to the alternative of excluding him? The evidence unmistakably shows that she assumed that she was to make this decision.

The marriage contract is, for most purposes, in law regarded as a civil contract; but one important exception must here be remembered, namely, it is not terminable at the option of the parties, or either of them. Until terminated by the decree of a competent tribunal, both parties are under all the obligations of the contract. *Blank v. Nohl*, 112 Mo., 159. One of these obligations is

manifestly cohabitation. The contract, according to the wife's version, itself provides for cohabitation for an indefinite period. Thus it is apparent that there was no contemplation that there should be an immediate separation, but, on the contrary, a clear and undisputed understanding that continued cohabitation was feasible and within the desire of both parties. Nor was there an immediate separation. The parties lived together for a time thereafter. Society has an indubitable interest in the preservation of the home, and the perpetuity of the domestic relations. Whatever threatens the continuation of the marriage relation, when once established, is a menace against society itself. By the terms of this contract, according to the wife's contention, the perpetuity of the marriage relation was subject to the whim of the wife. She was in possession of all the real estate and strenuously asserted her ownership of all the personal property. While the rigor of the common law, which accorded to the wife a place of dependence and submission to the will of the husband, and declaring her incapable of holding property in her own right, has been greatly modified by statute, the reformation can never have contemplated a situation such as that shown in this record, where the wife, by an unconscionable contract, has become "monarch of all she surveys," claiming the undisputed right to terminate the marriage relation at will, keeping all the property, and turning the husband upon the world with a bare pittance for his subsistence. It may be admitted that where serious disputes have once arisen between husband and wife as to the ownership of the real property upon which the family resides, and from which the common livelihood is derived, the domestic happiness is in jeopardy. But a contract entered into looking to a settlement of the dispute, and contemplating a continuation of the marriage relation, can not be upheld if, instead of promoting and encouraging a restoration of domestic peace, it in fact gives to one of the parties a strong motive to encourage discord. The contract in the case at bar, as

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understood by the wife, removed from her one of the most potent restraints upon her temper. The domestic happiness of few families would be secure with such a contract between husband and wife in force.

The contract was calculated to bring about a separation. It is therefore distinguished from those cases where a separation has already taken place, or where one takes place immediately in pursuance of the agreement, and the situation already developed is such that future cohabitation would likely be inconsistent with the health and happiness of the parties. In the case of *Randall v. Randall*, 37 Mich., 563, it is held that "a contract between husband and wife will not be sustained when likely to favor a separation that has not yet taken place." In the opinion in that case Chief Justice Cooley says: "It is not the policy of the law to encourage such separations, or to favor them by supporting such arrangements as are calculated to bring them about. It has accordingly been decided that articles calculated to favor a separation which has not yet taken place will not be supported. [Citing *Durant v. Titley*, 7 Price [Eng.], 577; *St. John v. St. John*, 11 Ves. Ch. [Eng.], 526; *Westmeath v. Westmeath*, Jac. [Eng.], 126.] But when a separation has actually taken place, or when it has been fully decided upon, and the articles contemplate a suitable provision for the wife and children, or an equitable and suitable division of the property, the benefits of which both have enjoyed during coverture, no principle of public policy is disturbed by them; on the contrary, if they are fair and equal, and not the result of fraud or coercion, reasons abundant may be found for supporting them." In the case of *Boland v. O'Neil*, 72 Conn., 217, it is said: "No agreement looking to a future separation of husband and wife, nor for her maintenance after such separation, will be upheld by a court of equity." In the case of *Hutton v. Hutton's Admr.*, 3 Pa. St. [3 Barr], 100, the supreme court of Pennsylvania says: "Deeds for the separation of husband and wife, are valid and effectual both in law and equity, provided their ob-

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ject be actual and immediate, and not a contingent or future separation." At page 104 it is said: "It is conceded that the policy of the law does not sanction contracts by which husband and wife may be induced to separate." In the case of *Jenne v. Marble*, 37 Mich., 319, 320, it is said: "The law does not intend any rule that will tend to destroy the value and confidence of the marital relation." In *Wilde v. Wilde*, 37 Nebr., 891, this court has said that a contract between husband and wife, manifestly against public policy or sound morals, will not be enforced.

It sufficiently appears that the contract upon the terms contended for by the wife can not be upheld, as being manifestly against public policy. The findings and judgment of the district court are fully sustained by the evidence. It is therefore recommended that the judgment of the district court be in all respects affirmed.

HASTINGS and DAY, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

NOTE.—*Marriage.—Divorce.—Law Favors the Former. Disfavors the Latter.—Public Policy.* It is the settled policy of the law to favor marriage, and to discourage divorce.

A marriage legal where solemnized, is valid everywhere.—*Hills v. State*, 61 Nebr., 589.

Where a party leaves the state of his domicile and resides temporarily in another state for the statutory period, merely for the purpose of obtaining a divorce, the marriage relation is not dissolved by the decree of the foreign court. *Dunham v. Dunham*, 57 Ill. App., 475, 500, affirmed in 162 Ill., 589, 614; *Beach v. Beach*, 4 Okla., 359, 399. A citizen of one state can not obtain a divorce in another state, which could not be obtained in the state of his or her domicile, where the removal was merely for the purpose of evading their own laws. *Hanover v. Turner*, 14 Mass. 227; *Brown v. Brown*, 14 N. J. Eq., 78.

Quere—Did the rule that the law favors marriage and discourages divorce originate in Christian morality? or was it a principle, transplanted from the civil law, which originated at the time Augustus taxed old bachelors, and paid bounties for babies because celibacy had become prevalent during the civil wars *contra publicam politiam*?

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A note executed by a husband to his wife living separate from him to induce her to return, can not be enforced by the wife. *Copeland v. Boaz*, 40 Am. Rep. [Tenn.], 89. *Contra: Phillips v. Meyers*, 25 Am. Rep. [Ill.], 295.

The full faith and credit clause of the Federal Constitution, is not violated by the refusal of the Massachusetts courts, acting in accordance with Massachusetts Public Statutes, chapter 146, sec. 41, to give effect to a decree of divorce rendered by a court of another state in favor of one who temporarily left the state of Massachusetts, where he was domiciled, for the purpose of obtaining a divorce for a cause which occurred in that state while the parties resided there, but which was not a ground for divorce in that state. *Andrews v. Andrews*, 188 U. S., 14. Brewer, Shiras and Peckham, JJ., dissenting.

The appearance of the non-resident defendant, can not invest a court with jurisdiction of a suit for divorce instituted by a person who has no bona-fide domicile within the state. *Andrews v. Andrews*, 188 U. S., 14. Brewer, Shiras and Peckham, JJ., dissenting.—REPORTER.

J. C. WILSON, APPELLEE, v. HENRY GRIESS ET AL., APPELLEES, IMPEADED WITH FARMERS' STATE BANK OF SARONVILLE, APPELLANT.

FILED MAY 21, 1902. No. 11,666.

Commissioner's opinion, Department No. 2.

1. **Bank: NOTE: COLLECTION: RENEWAL: INCLUDING ANOTHER DEBT: DIRECT PECUNIARY INTEREST.** A national bank, which held a note of \$490 for collection, belonging to another bank, of which it was a large stockholder, took a renewal thereof and included in such renewal note an amount of its own unsecured debt against the maker sufficient to make the amount of the renewal note \$815.45, and at the same time obtained a mortgage upon the homestead of the debtor, signed by himself and wife, to secure the payment of the said renewal note. *Held*, That the national bank and its stockholders had a direct pecuniary and beneficial interest in the transaction.
2. **Acknowledgment: ASSISTANT CASHIER: MORTGAGE VOID.** The assistant cashier of such bank, who was also a director and stockholder thereof, was the notary public before whom the mortgage was acknowledged. *Held*, That he could not lawfully take such acknowledgment; that he was disqualified to act as such officer on account of his direct pecuniary interest in the matter, and that the acknowledgment and the mortgage were both void.

APPEAL from the district court for Hamilton county.
Heard below before SORNBORGER, J. *Affirmed.*

Thomas H. Matters, for apppellant.

Hainer & Smith, contra.

BARNES, C.

One J. C. Wilson commenced an action in the district court of Hamilton county against Henry Griess and Christina Griess, his wife, the Farmers' State Bank of Saronville, Nebraska, Jacob Griess and the Sutton National Bank, to foreclose a certain mortgage for \$350, executed by Henry Griess and Christina Griess upon the southwest quarter of section 27, township 9 north, range 5 west, situated in said county. The petition for foreclosure was in the usual form; service was made upon all of the defendants, and the Farmers' State Bank of Saronville filed its answer in the nature of a cross-petition praying for the foreclosure of a mortgage alleged to have been executed to it by the defendants Henry Griess and Christina Griess, upon the same tract of land to secure the payment of a promissory note for \$815.45, dated June 2, 1894. Default was taken against the defendants, Henry Griess and Christina Griess, and on the 8th day of December, 1896, a decree was rendered foreclosing the mortgage of the plaintiff, Wilson, and also the mortgage belonging to the Farmers' State Bank of Saronville. The amount found due said bank was not inserted in the decree, and afterwards, on the 29th day of September, 1897, it was agreed in open court by and between the defendants Henry Griess and Christina Griess and the Farmers' State Bank of Saronville that so much of the decree as related to the mortgage of the bank should be vacated, and that the defendants Henry Griess and Christina Griess be allowed twenty days to plead to its said answer and cross-petition. The cross-petitioner was allowed ten days thereafter to reply, and thereupon the cause was continued until the next term of

court. In accordance with the said arrangements, the answer of Henry Griess and Christina Griess to the answer and cross-petition of the bank was duly filed. It was alleged in the said answer that the mortgage set out in the answer and cross-petition of the bank described the homestead of the answering defendants; that the same was never executed by them knowingly, but was obtained by means of fraud, misrepresentation and deceit practiced upon them by and through the First National Bank of Sutton; that the notary who took the acknowledgment of the mortgage was an officer, director and stockholder of the First National Bank of Sutton; that said bank and the said notary had a direct pecuniary beneficial interest in the transaction; that the note and mortgage in question was not owned by, and was not the property of, the bank of Saronville, but was in fact and in truth the property of the First National Bank of Sutton, which, it was alleged, was the real party in interest in the case. Usury and numerous other defenses were also pleaded in the answer, and many transactions between the answering defendants and the First National Bank of Sutton were set forth at large in the pleadings, and it was alleged that the First National Bank of Sutton ought to be made a party to the suit. The answer concluded with a prayer that the said bank be made a party; that summons be served upon it; that it be required to answer, and that an accounting be had between the answering defendants and the said banks; that the mortgage be declared void and held for naught; and that the answering defendants recover from the First National Bank of Sutton whatever sum should be found due them from the said bank on a full and complete accounting in regard to all of the transactions set forth in the answer. Thereupon the First National Bank of Sutton was made a party defendant, and filed its answer to the answer and cross-petition of Henry Griess and Christina Griess. The Farmers' State Bank of Saronville filed a reply to said answer, and upon the issues thus joined the cause was tried to the court. After the introduction of

the evidence the court took the case under advisement, and at a succeeding term made a general finding for the defendants Henry Griess and Christina Griess, and by its decree dismissed the cross-petition of the Farmers' State Bank of Saronville, with costs. Thereupon the said bank brought the case to this court on appeal.

A large amount of evidence was taken upon the trial bearing upon all of the questions raised by the pleadings, and a portion of said evidence will be hereinafter noticed. If the acknowledgment of the mortgage in question is void, the decree of the district court must be affirmed. We will now proceed to determine that question.

1. It is contended by the appellees that the acknowledgment of the mortgage is void because the land described therein is the homestead of Henry Griess and his wife, Christina Griess; that Theodore Miller, the notary who took the acknowledgment, was at the time an officer, director and stockholder in the First National Bank of Sutton; that said bank was the real party in interest; and that said bank and the said Miller had a direct pecuniary beneficial interest in the transaction. It is the established law of many of the states that where the officer taking an acknowledgment of a mortgage has a direct pecuniary or beneficial interest in obtaining the same he is disqualified thereby, and the acknowledgment is void. This rule of law is commented upon, and in fact acknowledged and approved, by this court in *Horbach v. Tyrrell*, 48 Nebr., 514, and *Havemeyer v. Dahn*, 48 Nebr., 536. We will now examine the record and evidence herein, and determine whether or not this case comes within this well-settled rule. The evidence shows without conflict that on and before the 2d day of June, 1894, the First National Bank of Sutton held a note against Henry Griess for \$1,592, besides some other items of unsecured indebtedness; that it had in its possession, as agent for the appellant, a note signed by Henry Griess for \$490 which was also unsecured; that at said time Theodore Miller, the notary public who took the acknowledgment to the mortgage in question, was a di-

rector and stockholder in said National Bank, and was its assistant cashier; that one M. L. Luebben was its cashier; that the said National Bank owned a large amount of the stock of the Farmers' State Bank of Saronville, and that cashier, Luebben, was the vice-president of said last named bank; that the First National Bank was largely interested in the Saronville bank and helped it to loan its money. It is also shown that at that time Henry Griess owned the northwest quarter of section 27, and also the southwest quarter of that section, which is the land in controversy; and that he resided upon said southwest quarter with his wife, Christina Griess, and the other members of the family; and that for many years it had been, and was at said time, his homestead; that a short time prior to the said 2d day of June, Miller had been out to the farm to visit Griess and wife, and had told Griess that he could get him a loan of \$1,800 upon the north quarter of his land, which would take up a mortgage of \$1,000 about to become due thereon, and give him, the said Griess, \$800 to apply upon his other debts; that Griess and his wife had agreed to come into the bank and make an application for the loan, or execute a mortgage upon the north quarter of their land, and thus perfect the loan. It is shown further that in accordance with said arrangement Griess and his wife went to the bank on the 2d day of June, aforesaid, where they found Miller and Luebben; that such proceedings were had and arrangements made that Griess and wife executed a note for \$1,881 to the First National Bank of Sutton, and secured its payment by a mortgage upon the north quarter of their land, thus covering the amount due on the \$1,592 note and some other items which were not clearly explained; and in addition thereto it appears that they executed another note for \$815.45 to the Farmers' State Bank of Saronville, and secured the payment thereof by a mortgage upon their homestead, to wit, the southwest quarter of section 27, which note and mortgage are the ones in question in this suit. The note for \$490 which the National Bank held for the Saronville Bank

was a part of the consideration of this note and mortgage for \$815.45. The balance of the consideration was made up of certain unsecured items of indebtedness which the National Bank owned and held against Henry Griess. The note for \$490 was also an unsecured debt. By taking this note for \$815.45 and the mortgage securing the payment of the same, there was thus secured a debt of \$490, with interest, belonging to the Farmers' State Bank of Saronville, and an additional amount sufficient to make up the \$815.45 of unsecured indebtedness belonging to the First National Bank of Sutton. Thereupon the First National Bank credited the Farmers' State Bank with the amount of the \$490. The balance of the \$815.45 was clearly and undoubtedly the property of the First National Bank, and remained so until the note was transmitted to the Farmers' State Bank, and settlement made for it between them. It is not claimed that the Farmers' State Bank of Saronville ever had any interest in the indebtedness which made up the \$815.45 note, except that evidenced by the \$490 note. On June 8, 1894, the First National Bank charged the Farmers' State Bank with the amount of the \$815.45 note, and gave the Farmers' State Bank credit for the \$490 note, with interest thereon; the Farmers' State Bank subsequently made corresponding entries upon its books. The question arises, did the First National Bank of Sutton have a direct pecuniary and beneficial interest in the note of \$815.45, and the mortgage securing the same when they were executed, and was Theodore Miller, the director, stockholder and assistant cashier of the bank, competent to take the acknowledgment of the mortgage? It can not be contended, in the face of these undisputed facts, that the First National Bank of Sutton did not have a direct pecuniary interest in the note for \$815.45 and the mortgage securing the same. It was directly interested in nearly one-half of the consideration which made up this note. Besides it secured that amount of unsecured indebtedness, which certainly was a matter of pecuniary interest to it. It secured for the appellant at least \$490 of an unsecured

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indebtedness, and was thus enabled to turn over the note and mortgage to the appellant, and receive as a cash credit the amount of its own direct interest in the transaction. In addition thereto, being a large stockholder of the appellant bank, there would indirectly accrue to it the benefits derived from the collection of the balance of the note. The notary, Miller, was not only a director, and assistant cashier of the First National Bank, but he was also a stockholder thereof. The stockholders of a banking corporation are the persons, and the only persons, directly interested in its assets and in the collection of the moneys due it. Therefore, not only was the First National Bank directly interested in a pecuniary way in this transaction, but the stockholder Miller also had a direct pecuniary beneficial interest therein.

2. In *Horbach v. Tyrrell*, and *Havemeyer v. Dahn*, *supra*, both in the syllabi and in the body of the opinions, it is conceded as a general proposition that an officer who is a party to a conveyance or interested therein is disqualified from taking the acknowledgment of a mortgage in which he has a beneficial interest. In the case of *Workman's Mutual Aid Ass'n v. Monroe*, 53 S. W. Rep. [Tex.], 1029, the notary taking the acknowledgment of a contract creating a lien upon the homestead was a director and stockholder in the association obtaining the lien, and it was held that the acknowledgment was void because he had a pecuniary interest in the transaction. In *Bexar Building & Loan Ass'n v. Heady*, 50 S. W. Rep. [Tex.], 1079, the notary was secretary and a stockholder of the association. It was held that an acknowledgment taken by him was void because he had a direct pecuniary beneficial interest in the transaction. In *Kothe v. Krag-Reynolds Co.*, 50 N. E. Rep. [Ind.], 594, it was held that an acknowledgment of a mortgage taken by a notary who was a stockholder and officer in the corporation which was the mortgagee was void, both irrespective of the statute and also under the express provisions thereof prohibiting an officer of a corporation from acting as a notary in its business. This

is a well-considered case, and collates a large number of authorities holding to the same effect. In *Smith v. Clark*, 69 N. W. Rep. [Ia.], 1011, it was held that an acknowledgment of a mortgage taken by a notary who is a stockholder in a bank which is a beneficiary under the mortgage is void. In this case the mortgage was not taken to the bank, but to another, to secure an indebtedness which was subsequently to be paid to the bank, and yet it was held that an acknowledgment taken by the notary, who was simply a stockholder in the bank, rendered it void. In *Miles v. Kelley*, 40 S. W. Rep. [Tex.], 599, it was held that a managing agent and stockholder in a building and loan association could not take an acknowledgment of a mortgage to the association, because of his pecuniary interests therein. It is contended by the appellant that because the interest of the First National Bank of Sutton in the note and mortgage in controversy was small, that no such beneficial interest in a pecuniary way would accrue to Miller, the cashier, stockholder and director of said bank, as would render him disqualified, by reason thereof, to take the acknowledgment. We hold that this is not a question of degree or amount of interest; that, if there was any beneficial interest in a pecuniary way which would accrue to Miller by reason of these transactions, he was disqualified from taking the acknowledgment to the mortgage in question. Ordinarily, a mortgage is good between the parties thereto without an acknowledgment; but in this case the land was a homestead, and under the express provisions of our own statutes it could not be conveyed or encumbered without the acknowledgment of the wife, made in full compliance with all the requirements of the law in that behalf. It follows that, if the acknowledgment is void, then the mortgage itself is void, and the decree of the district court dismissing the appellant's cross-petition is right. We are constrained to hold that the First National Bank of Sutton had such a direct pecuniary and beneficial interest in the note and mortgage in suit as rendered its cashier, director and stockholder disqualified from taking

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the acknowledgment in question herein. We further hold that the mortgage was void for want of a legal acknowledgment. This renders it unnecessary for us to discuss or determine any of the other questions presented by the record herein.

For the foregoing reasons we recommend that the decree of the district court be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

**GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN
OF NEBRASKA V. FRANTISKA BARTES.**

FILED MAY 21, 1902. No. 11,764.

Commissioner's opinion, Department No. 2.

1. **Fraternal Beneficiary Association: DOMESTIC CORPORATION: SERVICE OF PROCESS.** A fraternal beneficiary association, having a grand lodge and principal place of business in this state, and which is doing an insurance business therein, is a domestic corporation or association, under the provisions of section 91, chapter 43, of the Compiled Statutes; and service of summons should be made upon it according to the provisions of chapter 2 of the Code, providing for service of summons on corporations and insurance companies.
2. ———: ———: ———: ———: **ANSWER: OBJECTION TO JURISDICTION: WAIVER.** Where such association is not privileged from being sued in the county where the action against it is commenced, and it appears in such action and files an answer which contains an objection to the jurisdiction, and also a defense to the action upon the merits thereof, such answer is a waiver of the jurisdictional questions, and the case should be proceeded in, and tried upon its merits.
3. **Proof: FACTS STATED IN ANSWER: DEFECT IN NAME OF PARTY DEFENDANT.** It is reversible error to refuse to allow a defendant to introduce proof of the facts stated in its answer as a defense to the plaintiff's petition, on the ground of a defect in the name

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of the party defendant as set forth in said petition, where the court has previously overruled defendant's objections to jurisdiction over its person, and required it to answer.

ERROR from the district court for Colfax county. Tried below before WESTOVER, J. *Reversed.*

W. P. Hall and Matthew Gering, for plaintiff in error.

Frank Dolezal, *contra.*

BARNES, C.

On the 17th day of March, 1899, Frantiska Bartes filed her petition in the district court of Colfax county to recover the sum of \$2,000, claimed to be due to her on a certificate of insurance issued by the Grand Lodge of the Ancient Order of United Workmen of Nebraska to her deceased husband, Joseph Bartes, which certificate bore date the 14th of August, 1894, and was issued to the deceased as a member of the workman degree of Jan Zizka Lodge, No. 295, subordinate to the said grand lodge. The petition was in the usual form, and the allegations contained therein were sufficient to constitute a cause of action. The only defect which appeared therein was that the suit was brought against the Ancient Order of United Workmen by its generic or common name, instead of the Grand Lodge of the Ancient Order of United Workmen of Nebraska, the association which issued the certificate. It was alleged in the petition that the defendant so designated by its generic or common name "was a foreign fraternal order, duly organized and existing and doing the business of life insurance on the lodge plan under and by virtue of the laws of the state of Nebraska; said defendant not being organized or existing under the laws of this state but doing its business of life insurance in this state under the laws hereof." It was not alleged in the petition when, where, how or under the laws of what state or country, the defendant designated therein was organized. Upon filing of her petition the plaintiff caused a summons to

be issued by the clerk of the district court of Colfax county, directed to the sheriff of Lancaster county, who served the same upon John F. Cornell, the then auditor of public accounts of this state. Cornell forwarded the copy of the summons so served upon him to the officers of the Grand Lodge of the Ancient Order of United Workmen of Nebraska, at their general offices and place of business in Grand Island. At the May term of the district court in Colfax county the grand lodge aforesaid appeared specially in said cause, and objected to the jurisdiction of the court, because no summons had been served upon it in the manner provided by law. This objection was set forth in many different ways, and was properly substantiated by affidavits and otherwise; and upon consideration of the said objection the district court overruled the same, allowed the defendant the grand lodge forty days in which to file its answer, and the plaintiff was given twenty days thereafter in which to reply. The defendant's amended answer, on which the cause was finally tried, was filed on the 29th day of July, 1899. In the said answer the defendant again raised the question of jurisdiction. In addition thereto it set forth in the answer matters and things which constituted a defense to the action upon the merits, among which was an allegation that the certificate upon which the suit was brought, was obtained by fraud and misrepresentation on the part of the defendant as to his age; that by reason thereof, according to the by-laws of the order of which the deceased was a member, said certificate was null and void. A reply was filed to this answer, in which the plaintiff pleaded a waiver on the part of the defendant, and an estoppel. The cause came on for trial at the November, 1899, term of court, and was tried to a jury. After the jury was impaneled, the defendant admitted that the Grand Lodge of the Ancient Order of United Workmen of Nebraska issued the certificate in question by and through its grand master workman, J. G. Tate, and its grand recorder, George H. Barber; that the certificate was also signed by Master Workman John Koza, and Recorder J.

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B. Mathauser, of Jan Zizka Lodge, No. 295, of which the deceased was a member; that Frantiska Bartes, the plaintiff, was the beneficiary named in said certificate, and was also the wife of the late Joseph Bartes, deceased; that proof of death, as required by law, had been furnished; that Joseph Bartes was a resident of Colfax county at the time of his death; and that he died therein. Thereupon the plaintiff introduced the certificate in evidence, together with other testimony, and then admitted that on the 12th day of December, 1898, at Clarkson, Nebraska, there was tendered to her, in lawful money of the United States, the sum of \$43.60, together with interest thereon at the rate of seven per cent. per annum, upon each payment from the date when the deceased entered the lodge to the date of his death; that the tender was made by M. E. Sholtz, grand master workman of the defendant, the Grand Lodge of the Ancient Order of United Workmen of the state of Nebraska, to her personally, which tender included all the assessments which had been paid by the deceased, Joseph Bartes. It was also admitted by the plaintiff that the signature on the first page of Exhibit 2, found in the record, to wit, the name of Joseph Bartes, was signed by him at the time therein stated; and that the signature on page three of Exhibit 2 was also signed by him, and that the same was in his handwriting. The plaintiff having rested her case, the defendant offered evidence to sustain the allegations of its answer, and establish the defenses therein contained. This evidence was objected to, and the objections were sustained, whereupon the plaintiff moved the court for a verdict in her favor. The defendant again offered evidence in detail tending to establish all of the allegations and matters of defense set forth in its answer. Objections to these offers were sustained, exceptions were duly noted thereto, and the court thereupon sustained the plaintiff's motion and directed the jury to return a verdict in her favor for the sum claimed in her petition, to wit, \$2,000, with interest, to which the defendant excepted. The jury returned a verdict in accordance with said direc-

tion. The defendant again excepted to all of the proceedings, filed a motion for a new trial, which was overruled, judgment was entered upon the verdict, and the defendant brought the case to this court by a petition in error. Hereafter the defendant in the court below will be called the "plaintiff," and the plaintiff in said court will be designated as the "defendant."

1. The plaintiff contends that the court erred in overruling its special appearance and objection to the jurisdiction, and requiring it to answer the petition of the defendant, because no service of summons had ever been made upon it in the manner provided by law. As we have heretofore stated, there was an attempt to allege in the petition that the Ancient Order of United Workmen was a foreign fraternal order, and service was sought to be made upon it by issuing a summons to the sheriff of Lancaster county, and having the same served upon the auditor of public accounts. There was a signal failure to accomplish this purpose. If the allegations of the petition on this point amount to anything they show, in effect, that the plaintiff was and is a fraternal beneficiary association, organized and doing business as such in this state, and is a domestic corporation. The record herein fully establishes the fact that the certificate upon which this suit was brought was issued by the Grand Lodge of the Ancient Order of United Workmen of the state of Nebraska. Section 91 of chapter 43 of the Compiled Statutes, relating to fraternal beneficiary associations, provides: "A fraternal beneficiary association is hereby declared to be a corporation, society or voluntary association formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. Each such society shall have a lodge system, with a ritualistic form of work and representative form of government." The Grand Lodge of the Ancient Order of United Workmen of the state of Nebraska is therefore a domestic corporation or association, and service of summons must be made upon it in the manner described in

chapter 2 of title 5 of the Code, providing for the service of summons upon corporations and insurance companies. The summons in this case should have been directed to the sheriff of Hall county and served upon the grand master workman, or other chief officer or managing agent found at the offices of the said corporation, or association at its place of business in Grand Island. This was not done; and if the plaintiff had stood upon its special appearance, and had not answered to the merits, the court would have had no jurisdiction to proceed in the matter. It is further provided in the act relating to these associations that they may be sued in any county in this state in which is kept their proper place of business, or in which the beneficiary contract was made, or in which the death of the member occurred, or in the county of the residence of such deceased member. Therefore this action was properly commenced in Colfax county, and a summons issued and directed to the sheriff of Hall county, and served upon the association in the manner stated, would have conferred jurisdiction upon the court to proceed to the trial of the action and render a proper and suitable judgment therein. This is not a case where the association was privileged from being sued in the county where the action was commenced. We hold, therefore, that when the plaintiff herein answered over, after its objection to the jurisdiction of the court had been overruled, such answer to the merits conferred jurisdiction upon the court over the person of the plaintiff, and that part of its answer objecting to the jurisdiction was of no effect whatever; that the district court of Colfax county, upon the filing of the plaintiff's answer, had full authority to try and dispose of all of the questions involved in the case upon their merits. *Walker v. Turner*, 27 Nebr., 103, 106.

2. The plaintiff made no objection to the name by which it had been sued. It filed no plea in abatement, and by answering to the merits it disclosed its real and true name, and gave the court information by which it might have corrected the defect in the name of the plaintiff as set

forth in the petition. Having failed to make any objection thereto, it can not now claim any advantage by reason of a defect in the name of the party defendant as set out in the petition in the court below. Plaintiff was in court for all purposes upon the filing of its answer, and the action should have proceeded against it by its true and proper name and designation.

3. The plaintiff contends that the court erred in sustaining defendant's objections to the introduction of its evidence offered for the purpose of establishing its defense upon the merits. It seems that the trial court sustained the objections upon the theory that the plaintiff was not properly in court, and was not the proper defendant in the action. Having held that the objection to the jurisdiction and the special appearance was not well taken, and having required this plaintiff to answer to the merits and having allowed the defendant the benefits obtained by reason of the admissions made on the part of the plaintiff, obviating the necessity for the identification of the certificate in suit, and proof of the fact of its proper issuance, we are unable to see by what process of reasoning the court afterwards reached the conclusion that the plaintiff was not entitled to be heard in its defense to the action by the introduction of its evidence in support thereof. The record in this case shows beyond question that the suit should have been brought against the plaintiff in error as the Grand Lodge of the Ancient Order of United Workmen of Nebraska. It was the association which issued the certificate upon which the action was based. It was the only body possessing the power to levy and collect the assessments necessary to pay the amount of the certificate, or a judgment, if one should be obtained thereon. This being true, the plaintiff was the proper defendant and the real party in interest in said action, and should have been allowed to make its defense and have its day in court. We may well question the validity of the judgment herein. It is difficult to see how, without the appearance of the plaintiff, a judgment against the generic name or designation of

the Ancient Order of United Workmen could in any manner bind the plaintiff. How could such a judgment be collected? It is not contended that the Ancient Order of United Workmen, as designated in the petition in the court below, has any property or effects in this state upon which an execution could be levied, if the law permitted the levy of an execution in such cases. It is not claimed or suggested that the Ancient Order of United Workmen, by such designation, has any power or authority to levy assessments to pay the amount of the judgment obtained herein, or in any way enforce the payment of such assessments, if levied. The court should have required the defendant to amend or change the petition so as to properly describe the plaintiff herein by its proper name and designation before the final submission of the case. We hold that the plaintiff was in court, but we decline to determine in this proceeding whether or not the judgment is binding upon it. We further hold that the court erred in refusing to allow the plaintiff to introduce its evidence in support of the allegations of its answer, and make its proper defense on the trial of this cause. The plaintiff has never had its day in court, and for that reason the judgment should be reversed and the cause remanded for a new trial.

We therefore recommend that the judgment of the district court be reversed, and that this cause be remanded for a new trial, with leave to the defendant to correct her petition as suggested herein.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed, and the cause remanded for a new trial, with directions to allow the defendant in error to properly correct her petition as to the name of the party defendant.

REVERSED AND REMANDED.

FARMERS' MUTUAL INSURANCE COMPANY v. SAMUEL A. KINNEY.

FILED MAY 21, 1902. No. 11,362.

Commissioner's opinion, Department No. 2.

1. **Mutual Insurance Company: WHAT CONSTITUTES THE CONTRACT.**
When a mutual insurance company is organized under the provisions of the laws of this state, the provisions of the statute authorizing its organization, the articles of incorporation, and by-laws of the company, the application for membership and the certificate of membership constitute the contract between the company and its policy-holder.
2. ———: ———: **SUBSEQUENTLY ENACTED BY-LAWS.** When a member of a mutual insurance company agrees in his application to be governed by the by-laws and rules "now in force or hereafter adopted by said company," he will be bound by subsequently enacted by-laws of his company the same as he is by those in force at the time his certificate of membership is issued; provided that such subsequent by-laws are reasonable in their nature, and properly adopted in conformity with the authority conferred by the statute upon such company.
3. **Reasonable By-Law.** A by-law of a mutual insurance company, which provides that the company shall not be liable for any loss that may occur while a member is in default of the payment of a legal assessment, is a reasonable by-law, and will be upheld.
4. **Policy: PARTIAL DESTRUCTION: RECEIPT OF SUBSEQUENT ASSESSMENT: WAIVER OF DEFAULT.** Where all the property covered by a policy of a mutual fire insurance company is not destroyed, the receipt of subsequent assessments by the company, from a member who has sustained a loss while his policy was suspended for default in the payment of assessments, will not operate as a waiver of such default.

ERROR from the district court for Gage county. Tried below before STULL, J. *Reversed.*

Edwin M. Coffin, Ernest O. Kretsinger and Elliott J. Clements, for plaintiff in error.

A. D. McCandless and Jefferson H. Broady, contra.

OLDHAM, C.

This was an action on a fire insurance policy for damages for the alleged loss by fire of a dwelling-house and its

contents on the 3d day of November, 1898. The issuing and delivering of the policy by the defendant insurance company was admitted in the answer, but liability for the loss was denied on the ground that an assessment of \$5.63 was made on plaintiff's policy by the company on the 1st day of September, 1898, due notice of which was given to plaintiff, and that the same was unpaid at the time the fire occurred, and that on the 31st day of October, 1898, under the by-laws adopted by the company, the policy of plaintiff had lapsed in consequence of his failure to pay his September assessment. Plaintiff admitted that his September assessment had not been paid until after the fire, but claimed that the assessment had been made without authority, and that the by-law of the company, under which his policy would lapse for non-payment of an assessment, if in force at all, was adopted after his policy had been issued, and that he was, therefore, not bound by it. He also contended that the acceptance by the company of subsequent assessments on his policy operated as a waiver of his delinquency. He also claimed that he had tendered the full amount of the assessment to the officers of the defendant company before the fire occurred and before his policy became inoperative, and because of their negligence in not receiving the assessment when tendered the forfeiture, if any, had been occasioned. The court below sustained the contention of plaintiff, excluded the evidence offered by the defendant company of the passage of the by-law under which the policy was suspended for the non-payment of the assessment, and directed a verdict for plaintiff, and defendant brings error to this court.

There is no disputed question of fact in the testimony, except as to whether or not the plaintiff had tendered the amount of the September assessment on his policy to the officers of the defendant company prior to the fire, and before his policy had lapsed under the provisions of the by-law on which the company relied. But this conflicting testimony can only become material in case the defendant insurance company has the right to excuse itself from lia-

bility under the provisions of a by-law passed after plaintiff's application had been received and approved and his policy issued, for there is no dispute about the fact that the by-law was adopted by the company in January, 1896, and that plaintiff's policy was issued in May, 1895. Defendant is a mutual insurance company organized under the provisions of chapter 33 of the Session Laws of Nebraska of the year 1891, the same being chapter 43 of Compiled Statutes of 1897. This statute, together with the articles of incorporation and the by-laws of defendant company, and the written application made by the plaintiff, and the certificate of membership issued to him, constitute the contract between plaintiff and defendant. *National Masonic Accident Ass'n v. Burr*, 44 Nebr., 256, 62 N. W. Rep., 466; Bacon, Mutual Benefit Societies and Life Insurance, 181; *Holland v. Supreme Council*, 25 Atl. Rep. [N. J.], 367; *Ebert v. Mutual Reserve Fund Life Ass'n*, 83 N. W. Rep. [Minn.], 506; *Hughes v. Wisconsin Odd Fellows' Mutual Life Ins. Co.*, 73 N. W. Rep. [Wis.], 1015.

Plaintiff's application for membership in the defendant company contained, among other things, the following agreement: "I hereby agree to be governed by the articles of incorporation, by-laws and rules now in force or hereafter adopted by said company, and also to pay all assessments made on me in accordance with the rules and by-laws of said company." This same provision is incorporated in and made a part of the policy on which this cause of action was based. The question then, arises, as to whether plaintiff, in view of this provision in his application and certificate of membership, is bound by by-laws, reasonable in their nature, and properly adopted under an authority conferred by the statute under which the company is organized, after he becomes a member of the association. An examination of many adjudged cases on this question leaves no doubt in our mind that under a great weight of authority a member of a mutual insurance company, who agrees in his application to be bound by sub-

sequent by-laws of his association, will, when such subsequent by-laws are reasonable, and enacted under properly delegated authority, be bound by those subsequently enacted in the same manner that he is bound by those in existence at the time his certificate of membership is issued. In *Hobbs v. Iowa Mutual Benefit Ass'n*, 47 N. W. Rep. [Ia.], 983, 984, it is said: "The members of a mutual insurance company are presumed to have knowledge of the articles of incorporation and by-laws of the company. *Walsh v. Ins. Co.*, 30 Ia., 144, 6 Am. Rep., 664; *Simeral v. Ins. Co.*, 18 Ia., 322. But it does not follow that they will be bound by all those adopted after their contracts of membership are made. Whether they will be or not will depend upon the terms of their contract. If that provide that members shall be bound by all articles and by-laws which may at any time be adopted, we know of no reason why it is not valid. In such cases, changes made are not in violation of the contract, but are in harmony with it." This doctrine is supported by the holdings in *Borgards v. Farmers' Mutual Ins. Co.*, 44 N. W. Rep. [Mich.], 856; *Hughes v. Wisconsin Odd Fellows' Mutual Life Ins. Co.*, *supra*; *Stohr v. San Francisco Musical Fund Society*, 82 Cal., 557, 22 Pac. Rep., 1125; *Supreme Commandery v. Ainsworth*, 71 Ala., 436, 443; *Korn v. Mutual Assurance Society*, 6 Cranch [U. S.], 192. See, also, 1 Bacon, Mutual Benefit Societies & Life Insurance, sec. 91a, and Niblack, Accident Insurance and Benefit Societies, sec. 60.

The next question to consider is as to whether the by-law offered in evidence by the defendant company and excluded by the court was a reasonable by-law, properly adopted under the authority conferred by statute. The by-law which was adopted by the annual meeting in 1896 was an amendment of article 10, of by-laws in force at the time plaintiff's policy was issued, and added to article 10 the provision that: "The company shall not, however, be liable for any loss the insured has sustained during the time said policy had lapsed by reason of non-payment of assessment." Under the provisions of section 56, chap-

ter 43, Compiled Statutes, mutual fire insurance companies are given the usual powers and made subject to the usual duties of corporations, and are authorized to make such by-laws, not inconsistent with the constitution and this act, as deemed necessary. By-laws providing for the suspension of members of mutual associations during the time of their delinquency in the payment of assessments have been held reasonable by this court in the case of *National Masonic Accident Ass'n v. Burr*, *supra*, and in *Phoenix Ins. Co. v. Bachelder*, 32 Nebr., 490.

The testimony offered by the defendant company tended to show that this by-law was properly adopted at the regular annual meeting of the stockholders of the company held in January, 1896. It would, then, appear that the by-law excluded by the court was a valid by-law, properly adopted, and binding on the plaintiff, and that if the operation of his policy was suspended for a failure to comply with this by-law, defendant should have been permitted to have shown this fact, unless the assessment for which he was in arrears was illegally levied, and without binding effect. The only objection alleged against the assessment was that it was one made at stated intervals. But we see no force in the objection that the assessment was one made at stated intervals, because such assessment at stated intervals is provided for in the by-laws of the company, and is authorized by section 62, chapter 43, Compiled Statutes.

It is finally contended by counsel for plaintiff that, even if the by-law on which the insurance company grounded its defense is valid and binding on plaintiff, still the exclusion of this by-law by the trial court was at most error without prejudice, in view of the fact that the insurance company had waived the forfeiture by accepting assessments from plaintiff subsequent to the fire. The evidence in the case discloses the fact that the plaintiff had much other valuable property remaining after the fire, which is still covered by his policy of insurance. In this case the evidence shows clearly that the secretary

of the defendant company notified plaintiff that his payment of subsequent insurance would not revive his policy on the property burned, but that it would revive it on the other property, so that there was nothing in its conduct that could have led the plaintiff to believe that the defendant company intended to waive his forfeiture by receipts of subsequent instalments on his policy. The facts in this case place it clearly within the rule announced in *National Masonic Accident Ass'n v. Burr, supra*, and clearly distinguish it from the rule announced in the recent case of *Johnston v. Phelps County Farmers' Mutual Ins. Co.*, 63 Nebr., 21.

We are therefore of the opinion that the learned trial court erred in excluding the record of the adoption of the by-law offered by the defendant company in the court below. We also think that the conflicting evidence as to whether the plaintiff had tendered the amount of his September assessment to the officers of the defendant company before the fire occurred, and as to whether plaintiff's delay in paying the assessment was occasioned by the request of defendant's officers that he wait until some agreed changes had been made in the policy because of a former loss by fire of some of the property insured, presented disputed questions of fact which should have been submitted to the jury under proper instructions.

We therefore recommend that the judgment of the district court be reversed, and the cause remanded for further proceedings.

BARNES and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and this cause is remanded for further proceedings according to law.

REVERSED AND REMANDED.

NOTE.—The by-laws of a mutual insurance company, are a part of the contract of insurance. *Evans v. TriMountain Mutual Fire Ins. Co.*, 9 Allen [Mass.], 329; *Hale v. Mechanics' Mutual Ins. Co.*, 6

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Gray [Mass.], 169; *Brewer v. Chelsea Mutual Fire Ins. Co.*, 14 Gray [Mass.], 203; *Baxter v. Chelsea Mutual Fire Ins. Co.*, 1 Allen [Mass.], 294.

"A proviso [of an insurance policy] in print too fine to be read by a person of middle age without spectacles, can not be considered a part of the contract." *Barnes v. McMurtry*, 29 Nebr., 178, 185.—REPORTER.

JOHN D. KNIGHT, EXECUTOR, v. AMOS H. DENMAN ET AL.*

FILED MAY 21, 1902. No. 11,503.

Commissioner's opinion, Department No. 2.

1. **Pleading:** DENIAL IPSORUM VERBORUM: TENDERS NO ISSUE. A denial of the very words of the allegations of the petition, without denying their substance and effect, tenders no issue.
2. **Negative Pregnant.** An answer denying that plaintiff's testatrix on a date named "was the owner in fee simple and entitled to possession" of the land in controversy, and denying that she died "on or about" said date, being consistent with ownership after said date and before she died, and also with ownership before and at said date, subject to a right of possession in someone else, does not put the plaintiff upon proof of title.
3. **Instruction:** LIMITATION: ADVERSE POSSESSION. An instruction which states that, if the owner of lands does not bring an action against one who wrongfully withholds possession within ten years after his cause of action accrues, he loses his right to bring or maintain such action, without adding that defendant's possession must be continuous, open, notorious, exclusive and adverse during the full period of ten years, is misleading and erroneous.
4. **Misleading Instruction:** NOT CURED BY CONFLICTING INSTRUCTION. The error in giving an incorrect or misleading instruction is not cured by giving other instructions which state the law correctly, where the several instructions are inconsistent or conflicting, or where, taken as a whole, they may convey an erroneous impression.
5. **Occupant:** ADVERSE POSSESSION. An occupant who claims by adverse possession, must show that he occupied adversely during the entire period of ten years.
6. ———: ———: COLOR OF TITLE: CLAIM OF RIGHT: INTENTION TO TRESPASS: EVIDENCE. Where such occupant entered originally without color of title or claim of right, and the acts relied on to show entry and occupation were consistent with a mere

*Rehearing allowed. Judgment of reversal adhered to.

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intention to trespass from time to time until interfered with by the true owner, his testimony that he intended to take possession and hold and occupy as owner, uncorroborated by acts necessarily indicating such intention, is not sufficient to require a finding in his favor.

ERROR from the district court for Butler county. Tried below before BATES, J. *Reversed.*

Edmund C. Strode (*Matt Miller* and *Jesse B. Strode*, of counsel), for plaintiff in error.

George P. Sheesly, Charles H. Slama and *Edward E. Good*, *contra.*

POUND, C.

John D. Knight, as executor of Helena V. W. Knight, brought this action against Denman and another to recover possession of a tract of 320 acres in Butler county. He alleges that on and prior to the 25th day of April, 1898, said Helena V. W. Knight was the owner and entitled to the immediate possession of said land; that she died on or about said 25th day of April, 1898, leaving a last will and testament, in which plaintiff is named as executor; that he was duly appointed executor, pursuant thereto, by the county court, qualified and entered upon his office, and is entitled to the possession of said premises. He further alleges that the defendants unlawfully keep him out of possession. The defendant Denman, in his answer, denies the several allegations of the petition *seriatim* in their very words, and adds a plea of adverse possession and the statute of limitations. Issue having been joined by reply, a trial was had, resulting in a verdict and judgment for the defendant. The plaintiff brings the cause here on error.

Plaintiff did not prove title at the trial, and the first question to be met is whether such proof was necessary under the pleadings. Where there is a general denial, or the allegations of title in the plaintiff are otherwise denied, it is well settled that plaintiff must establish a

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title from the common source, if the parties claim from a common source, and from the ultimate source, if they do not. As the rule is commonly stated, he must recover upon the strength of his own title, not upon the weakness of that of his adversary. But the rule has no application where plaintiff's paper title is not put in issue and the defendant relies solely upon adverse possession to establish an independent title in himself. Such, we think, is clearly the case here. The answer tenders no issue whatever as to the title asserted in the petition. A denial of the very words of the allegations of the petition, without denying their substance and effect, can not be given any force. *Harden v. Atchison & N. R. Co.*, 4 Nebr., 521; *Kuhland v. Sedgwick*, 17 Cal., 123; 1 Ency. Pl. & Pr., 798. The answer in the case at bar is particularly obnoxious to this objection. It denies that Helena V. W. Knight "on and prior to the 25th day of April, 1898, was the owner in fee simple and entitled to the possession of" the land in controversy, and denies that she died "on or about" said date. This is entirely consistent with ownership after April 25, 1898, and before she died, and also with ownership before and at said date, and at her death, subject to a right of possession in someone else as tenant or licensee. Plaintiff was not put on proof of title by such denials.

We think one of the instructions of the court which is excepted to so palpably wrong that it is not necessary to consider any of the other errors assigned. In this instruction the court stated that if the owner of lands does not bring an action against one who wrongfully withholds possession within ten years after his cause of action accrues he loses his right to bring or maintain such action. This proposition is made very emphatic by an explanation which is added, to the effect that the right of action is lost unless action is brought within ten years from the time the owner had a right to bring it, provided the defendant invokes the protection of the statute. It is obvious that, without adding that defendant's possession must be continuous, open, notorious, exclusive and adverse

during the full period of ten years, the proposition stated in the instruction is misleading and erroneous. The error was not cured by giving other instructions which state the law as to adverse possession correctly. Other instructions may supply details or amplify and explain. But where an instruction, as in this case, covers the whole field explicitly, and purports to tell all that is required to bar the plaintiff's action, the further instructions are simply in conflict with it and can only produce confusion and misunderstanding. *Missouri P. R. Co. v. Fox*, 56 Nebr., 746; *Williams v. McConaughy*, 58 Nebr., 656; *Knapp v. Chicago, K. & N. R. Co.*, 57 Nebr., 195; *Jensen v. Halstead*, 61 Nebr., 249. Moreover, in the case at bar the instructions, as a whole, convey an erroneous impression. There is nothing about them to indicate that the instructions as to adverse possession supplement or have any reference to the proposition stated in the instruction under review. A person unacquainted with the law might well understand that there is a distinction between actions to maintain the title and those for recovery of possession only; that while adverse possession, as defined in some of the instructions, would confer a perfect title, thus of necessity cutting plaintiff off, plaintiff's right to maintain an action to recover possession might be cut off by mere failure to sue in ten years after an entry by defendant, as explained in the other instruction, whether the requirements as to continued and exclusive adverse possession had been met or not. As the plaintiff introduced evidence which, if believed, tended to show a recognition of his title before the ten years had elapsed, the prejudicial character of such instructions is manifest.

But counsel argue that the verdict rendered was the only one that could be rendered under the evidence, and hence that the judgment must be affirmed without regard to errors occurring at the trial. *Jeffres v. Cashman*, 42 Nebr., 594; *Everett v. Hobleman*, 15 Nebr., 376. The action was brought in October, 1898, and defendant claims to have entered upon the land and taken adverse pos-

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session thereof in the spring of 1888. In consequence, the nature and character of his acts in 1888 and the intention with which they were done, is all-important in determining the issue as to adverse possession. An occupant who claims by adverse possession must show that he occupied adversely and as owner during the entire period of ten years. *Hull v. Chicago, B. & Q. R. Co.*, 21 Nebr., 371, 386; *Chicago, B. & Q. R. Co. v. Schalkopf*, 54 Nebr., 448, 450; *Lewon v. Heath*, 53 Nebr., 707; *Hoffine v. Ewings*, 60 Nebr., 729. While the intention to claim the land need not exist at the time of the entry, the statute will not begin to run until the possession is adverse, and the acts and intention of the occupant are those of an owner. *Cervena v. Thurston*, 59 Nebr., 343, 345. In the case at bar, the land was wild and unoccupied, and was chiefly suitable for grazing. In 1887 it was made use of by herders, in connection with many adjoining tracts of the same character. There seems to have been not a little contest among rival herders for exclusive use of these lands, but all were trespassers, and claimed no right or title beyond what immediate occupation with their herds might confer. In 1888 Denman leased an adjoining tract, and at once began to use the whole section of which the land in dispute is a part, as well as some other adjacent wild lands, for herding his cattle. He had no color of title whatever, and no claim of right. He never paid or attempted to pay any taxes. He abandoned the other tracts without protest when their owners appeared, and during the year 1888, at least, the utmost that he did was to keep cattle on the land during the grazing season, and drive off other trespassers as they had driven him off the year before. He claims, indeed, to have fenced this land in 1888. But the evidence shows merely that he built a fence along the line between the land and another tract which he held under the lease, and joined it to certain fences already existing. The new fence was treated as on the land to which he had some right under his lease, since the road ran beside it on the land in dis-

pute. As he had no color of title, a mere encroachment by a fence would not give him possession of any more than the strip so occupied. Thus it will be seen that during the first year, at least, he did nothing which is not entirely consistent with a mere intention to trespass from time to time till interfered with by the true owner. We are aware that color of title is not necessary to a claim of adverse possession. *Gatling v. Lane*, 17 Nebr., 77, 80, 82; *Murray v. Romine*, 60 Nebr., 94. We concede, also, that the motive with which adverse possession is taken, whether in good faith, under mistake as to boundaries, or a mistaken claim of right, or in bad faith with an intention of depriving the true owner without color of right, makes no difference. *Fitzgerald v. Brewster*, 31 Nebr., 51; *Omaha & Florence Loan & Trust Co. v. Hansen*, 32 Nebr., 449; *Tex v. Pflug*, 24 Nebr., 666; *Levy v. Yerga*, 25 Nebr., 764, 766; *Obernalte v. Edgar*, 28 Nebr., 70. But these rules do not dispense with the requirement that there be adverse possession during the entire period, and that the occupant be in as owner. "Every disseisin is a trespass. But every trespass is not a disseisin. A wrongful intention to oust the real owner must clearly appear in order to raise an act, which may be only a trespass, to the bad eminence of a disseisin." 4 Kent, Commentaries (12th ed.), 535. There must be adverse possession, and, where the acts relied on by the claimant are equally consistent with mere trespasses, it is obvious that adverse possession has not been shown. Where there is color of title or a claim of right, pasturing cattle upon the land in season, when the only use to which the land is well adapted, is undoubtedly sufficient possession. But where there is no claim of right, except as it may be inferred from such occasional use of the land, it is obvious that such use may co-exist with an intention of a different nature from that of asserting ownership. *Murray v. Romine*, 60 Nebr., 94, 97. The court has had occasion to insist upon this element of adverse possession several times. In *Colvin v. Republican Valley Land Ass'n*, 23 Nebr., 75, it is said:

"The possession must not only have been actual, open and continuous, but it must have been accompanied by an intention on his part to hold the land as the owner of it. It must have been under a claim of ownership." The claimant must show by his acts that he entered with the intention of claiming as his own. *Smith v. Hitchcock*, 38 Nebr., 104. "The fact of possession and its character—the occupant claiming to be the owner of the premises, is the test." *Gatling v. Lane*, 17 Nebr., 77, 79. Of course, it is no matter how this intention is made to appear, and ordinarily the nature and character of the occupancy will show it sufficiently. *Lewin v. Heath*, 53 Nebr., 707. But a plain distinction exists between use of wild lands for pasture by one who has color of title, and similar use by one who has no claim of right whatever. The tract in dispute was vacant and unimproved, and was in the constructive possession of Mrs. Knight. Two persons can not be severally in possession of the same tract at the same time. Hence, until Denman did more than trespass, he was not in possession. *Yorgensen v. Yorgensen*, 6 Nebr., 383. Color of title is a strong evidence in such cases that the acts are those of an owner. One enters upon land under color of title, intending to assert such title. He uses it because he believes himself owner and entitled to use it as such. Not so one who has no title or claim of right or title whatsoever. He may entertain a purpose of occupying as owner and appropriating the property or he may merely intend to trespass from time to time so long as the owner makes no objection. This is what Denman plainly did with reference to the other half of the section of which the land in dispute is a part. It is a matter of common knowledge that wild land in many localities was formerly, and in some may be even yet, trespassed over by herders in this way without any objection, and with no idea of hostile possession. Whether Denman was a mere trespasser of this sort, or an adverse occupant, is a question of fact; and the many cases where persons claiming under color of title, and paying taxes

as owners, have maintained possession of grazing lands by pasturing cattle thereon, are in no way decisive. It will be found that, in every case decided in this court in which the lands were unimproved, there was either color of title or else the occupant by paying taxes or by cultivation or improvement, did some acts of a decisive character which stamped his position as that of an owner. This fact was remarked in *Ballard v. Hansen*, 33 Nebr., 861. When it is said that the motive with which the occupant entered is immaterial, this means the motive with which he took adverse possession. It does not mean that the intention which gives character to equivocal acts, making them trespasses or a maintenance of possession as the case may be, is to be disregarded. All that we have by which to determine the character of Denman's acts during the summer of 1888—and that is the crucial period—is his testimony ten years afterward as to his intention. Whether what he then did is consistent with his testimony is a question for a jury. While there may be enough to sustain a verdict in his favor under proper instructions, the evidence is far from sufficient to compel such a conclusion.

We therefore recommend that the judgment be reversed and the cause remanded for a new trial.

BARNES, C., concurs, and OLDHAM, C., concurs in the result.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

CITY OF LINCOLN V. WILLIAM G. MORRISON ET AL.

FILED MAY 21, 1902. No. 11,576.

Commissioner's opinion, Department No. 2.

1. **Cestui Que Trust as a Preferred Creditor.** Misappropriation of a trust fund does not entitle *cestui que trust*, merely as such, and for that reason alone, to a preference over general creditors of an insolvent trustee.
2. ———. In order to obtain a preference, *cestui que trust* must show that the estate, out of which he claims such preference, has been increased to some extent by the misappropriation of the trust property; and he is entitled to a preference to the extent of such increase only.
3. **Trust Money: TRUSTEE'S FUNDS: MINGLING: CHARGE UPON WHOLE MASS.** Where a trustee mingles trust moneys with his own funds, *cestui que trust* is entitled to a charge upon the whole; and so long as any portion of the mass into which the trust fund has entered remains in any form, it is subject to such charge, and may be followed and claimed.
4. **Cestui Que Trust: ONUS PROBANDI.** The burden is upon *cestui que trust* to show that the trust money did in fact increase the estate out of which he seeks a preference, or is represented therein in some form. But it seems that where such money has gone into the general estate of a trustee, who afterwards becomes insolvent, there is a presumption that it remains therein at his insolvency and the court will not say that it can not be traced or has wholly disappeared where the contrary may fairly be inferred.
5. ———: **PRESUMPTION.** It is presumed that moneys drawn out of a fund wherein the trustee has mingled his own money and that of *cestui que trust* are his own, and, so long as any portion of the fund so constituted remains, it may be followed, and the charge of *cestui que trust* thereon may be asserted.
6. ———: **PREFERENCE OF CREDITORS.** But if the whole of such fund, or a greater portion thereof than that representing the trustee's own money is used by an insolvent trustee in paying his debts, *cestui que trust* is not entitled to a preference over general creditors for the amount of his money so lost.
7. ———: **LIEN OR CLAIM.** Property or assets of the insolvent trustee acquired before, or with the proceeds of property held before, the trust money came into his hands, and not in any way mingled therewith, are not subject to any lien or claim in *cestui que trust*,

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and the rights of the latter with respect thereto are those of a general creditor only.

8. ———. A change in the form of a portion of a fund in which money of the trustee personally and of *cestui que trust* has been mingled is not necessarily a withdrawal of such portion. When the trustee retains such portion and dissipates the remainder, the portion retained in the altered form is taken to represent such fund and may be claimed by *cestui que trust*.
9. ———: TRUST MONEY. Where a portion of a fund made up of trust money and of individual money of the trustee is invested, and a profit results, *cestui que trust*, in following the trust money into the investment, may claim such profit as the proceeds of the original funds upon which he had a charge, at least to the extent of said charge upon the original fund.
10. **Stare Decisis.** *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Nebr., 786, and *State v. Midland State Bank*, 52 Nebr., 1, limited. *State v. Bank of Commerce* 54 Nebr., 725, and *Morrison v. Lincoln Savings Bank & Safe Deposit Co.*, 57 Nebr., 225, adhered to.

ERROR from the district court for Lancaster county.
Tried below before HOLMES, J. *Reversed*.

Lambertson & Hall, for plaintiff in error.

Tibbets Bros., Morey & Anderson and *Lionel C. Burr*,
contra.

POUND, C.

This is a petition in error prosecuted by the city of Lincoln, an intervener in a suit brought to wind up the Lincoln Savings Bank & Safe Deposit Company, other phases whereof have been before this court several times. The plaintiff in error by its petition in intervention sought a preference over general creditors for some \$5,000—a balance of moneys of said city loaned to the bank upon certificate of deposit by the city treasurer, in contravention of law and with knowledge on the part of the bank officers as to whose money it was. It appeared from a stipulation of the parties and from the evidence adduced that on April 9, 1895, the city treasurer placed \$6,095.35 of the city's funds in the bank, taking a certificate of deposit therefor. Afterwards \$1,095.35 was paid on the

certificate, and a new certificate was issued for \$5,000. After said deposit was made, the bank had on deposit, in all, about \$240,000, of which \$41,699.96 was on hand in cash. On December 16, 1895, the bank suspended. At that time the deposits had fallen to about \$150,000, or, to be precise, \$92,453.43 had been paid out to depositors between the time when the city's money had been placed in the bank and the date of suspension. No money was loaned and no investments were made during this period, except that on April 16, 1895, the bank bought state warrants of the market value of \$36,750, using in payment therefor \$1,750 of the cash on hand, and \$35,000 borrowed of a bank in New York. The remainder of the cash on hand on April 9, 1895, and such moneys as accrued from collection or sale of paper already in the bank, it used in paying depositors and in running expenses. At the time the bank suspended there was but \$200 cash on hand. This sum had been pledged to secure sureties upon a supersedeas bond in a case wherein judgment had been rendered against the bank, and was afterwards applied upon such judgment. A receiver was appointed on January 22, 1896. When he took possession he received \$1,562.61 in cash, and "cash items" to the amount of \$239.07. He also received \$3,334.37 from sale of the warrants above referred to; such sum being the \$1,750 originally invested therein, and the profit after repaying the money borrowed to make the purchase. But it appears from the evidence that the cash and cash items which came into the hands of the receiver accrued from loans made by the bank, or from paper which it held, before the city's money was deposited therein. The district court, upon this testimony, found generally for the receiver and dismissed the city's petition.

Under the rulings of this court in *Morrison v. Lincoln Savings Bank & Safe Deposit Co.*, 57 Nebr., 225, and *State v. Bank of Commerce*, 54 Nebr., 725, several of the questions raised may be disposed of readily. But the former case does not of necessity involve the questions presented

by the case at bar, nor were the facts such as to require an affirmance of *State v. Bank of Commerce, supra*, while the latter case is vigorously assailed by counsel and we are asked to overrule it, and to reaffirm the rule recognized in prior decisions. Ordinarily we should not feel justified in reviewing a question determined by two recent decisions of this court. Were it a mere matter of these two decisions, so long as we feel satisfied that they are sound, we should do no more than cite them and proceed to apply them to this controversy. But in several prior cases, *State v. State Bank of Wahoo*, 42 Nebr., 896, *State v. Midland State Bank*, 52 Nebr., 1, and especially *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Nebr., 786, this court had expressly or by strong implication recognized and adopted a different rule. The cases last cited are sought to be distinguished in *State v. Bank of Commerce, supra*. Counsel have pointed out, however, that the attempt to distinguish the latter case from *Capital Nat. Bank v. Coldwater Nat. Bank, supra*, is founded on an entire misapprehension of the facts there presented; and, in any event, the reasoning in these two cases and the authorities severally relied on therein can not be reconciled. For this reason we think it expedient to state plainly that this court no longer adheres to the extreme view as to the right of *cestui que trust* to be preferred on insolvency of the trustee, expressed in the cases of *State v. State Bank of Wahoo*, *State v. Midland State Bank*, and *Capital Nat. Bank v. Coldwater Nat. Bank*, but adheres to the position taken in *State v. Bank of Commerce* and *Morrison v. Lincoln Savings Bank & Safe Deposit Co., supra*; to set forth our reasons for rejecting the one view and adopting the other; and to state as clearly and definitely as we may the rules by which causes such as the one at bar are to be decided.

The origin of the rules now recognized with respect to following trust money which has been mingled with the personal funds of the trustee or has passed into his general estate, is to be found in the opinion of Jessell, M. R.,

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in *Knatchbull v. Hallett*, 13 Ch. Div. [Eng.], 696-753. Prior to that decision it was said that money had no earmark, and that when a trust fund, in the form of money, became mingled with the moneys of the trustee personally, it lost its identity and could not be traced. Since that vigorous and convincing judgment, the idea that money, as such, could not be traced, and that trust property lost its identity when turned into money and confused with the trustee's funds, has been abandoned completely. But the limits of the extension of the rights of *cestui que trust* with respect to the property of insolvent trustees to which the decision in *Knatchbull v. Hallett* gave rise, were not perceived at first. All which that decision did was to wipe out the old dogma that money had no earmark, and to substitute the sensible rule that whenever trust property enters into a mass, to which the property of *cestui que trust* and that of the trustee have contributed, so long as the trust property remains in or forms a part of such mass, *cestui que trust* has a claim or charge thereon to that extent, and general creditors can not take advantage of, or derive a benefit from, the increase in the assets due and traceable to misappropriation of the trust fund. Several courts in this country, however, went much further, and established a rule which, though generally abandoned or modified in the more recent authorities, is still adhered to in some quarters, and at one time had the support of decisions of this court. *McLeod v. Evans*, 66 Wis., 401, 28 N. W. Rep., 173; *First Nat. Bank v. Hummel*, 14 Colo., 259, 23 Pac. Rep., 986; *Peak v. Ellicott*, 30 Kan., 156, 1 Pac. Rep., 499; *Myers v. Board of Education*, 51 Kan., 87, 32 Pac. Rep., 658; *Evangelical Synod v. Schoeneich*, 143 Mo., 652, 45 S. W. Rep., 647; *Tierman's Ex'r v. Security Building & Loan Ass'n*, 152 Mo., 135, 53 S. W. Rep., 1072; *Independent District v. King*, 80 Ia., 497, 45 N. W. Rep., 908; *Davenport Plow Co. v. Lamp*, 80 Ia., 722, 45 N. W. Rep., 1049. The supreme court of Iowa has receded somewhat in *District Township of Eureka v. Farmers' Bank*, 88 Ia., 194, 55 N. W. Rep., 342.

And a divided court in Wisconsin has overturned *McLeod v. Evans, supra*, which was itself the decision of a divided court. *Nonotuck Silk Co. v. Flanders*, 87 Wis., 237, 58 N. W. Rep., 383. See, also, *Bircher v. Walther*, 63 S. W. Rep. [Mo.], 691. But this court, in *Capital Nat. Bank v. Coldwater Nat. Bank, supra*, expressly refused to follow the silk company case, and adhered to *McLeod v. Evans*. In the view of these authorities, if trust property has been misappropriated and has gone into the estate of the trustee, *cestui que trust* is to be preferred, and is to receive his money to the exclusion of general creditors. As the court put it in *Capital Nat. Bank v. Coldwater Nat. Bank, supra*, the question is not one of identifying or claiming a sum actually deposited, but of compelling the insolvent to first restore the trust property, treating that as something which he had no power to commingle with other funds, but must keep whole and make up so long as he has any funds or property out of which to do so. Other cases do not go so far expressly, but reach the same result, either by holding that, if the insolvent trustee uses the whole fund to pay his debts, the effect is to increase his general estate and create a charge thereon in favor of *cestui que trust*, or by ruling that when the trust fund is once traced into the general property of the trustee it is conclusively presumed to remain there. *McLeod v. Evans, supra*; *Peak v. Ellicott, supra*; *Myers v. Board of Education, supra*; *Independent District v. King, supra*.

We are not able to agree to the rule just stated in any of the forms which it has assumed. We are satisfied that the court did well when in *State v. Bank of Commerce* it withdrew its support therefrom, and took a position in accord with the great weight of recent authority. The court was in error in saying (54 Nebr., 731) that the moneys which came into the hands of the receiver of the Capital National Bank on its insolvency were more than sufficient to meet the preferred claims established in *Capital Nat. Bank v. Coldwater Nat. Bank, supra*, and its companion cases. Such sum was greater than the pre-

ferred claim established in any one suit, but the aggregate considerably exceeded it, and the record in each case showed that fact. Hence *State v. Bank of Commerce* is not reconcilable with prior decisions of the court, and must stand on its own foundation, which we think it may do safely. Not only is it in accord with the overwhelming majority of recent decisions upon this point, and with the general tendency to abandon or recede from *McLeod v. Evans* and the cases following that decision, but on principle is clearly right. Of express decisions in the last three years upon this very point, we may cite: *Ellicott v. Kuhl*, 60 N. J. Eq., 333, 46 Atl. Rep., 945; *Collins v. Steuart*, 58 N. J. Eq., 392, 44 Atl. Rep., 467; *Collins v. Lewis*, 60 N. J. Eq., 488, 46 Atl. Rep., 1098; *Twohy Mercantile Co. v. Melbye*, 78 Minn., 357, 81 N. W. Rep., 20; *Beard v. Independent District*, 31 C. C. A. [U. S.], 562, 88 Fed. Rep., 375; *Robinson v. Woodward*, 48 S. W. Rep. [Ky.], 1082; *Wulbern v. Timmons*, 55 S. Car., 456, 33 S. E. Rep., 568; *Byrne v. McGrath*, 130 Cal., 316, 62 Pac. Rep., 559; *Shute v. Hinman*, 34 Ore., 578, 58 Pac. Rep., 882; *Bircher v. Walther*, 63 S. W. Rep. [Mo.], 691. These cases, and many others cited in *State v. Bank of Commerce*, *supra*, and *Morrison v. Lincoln Savings Bank & Safe Deposit Co.*, *supra*, establish clearly that misappropriation of a trust fund does not entitle *cestui que trust*, merely as such, and for that reason alone, to a preference over general creditors of an insolvent trustee. So long as the trust property in any shape or form can be recognized, it belongs to *cestui que trust*. So long as it enters into any fund, property, or mass of assets in any way, *cestui que trust* has a charge or lien which he may enforce upon the whole. But if the trustee "destroys a trust fund by dissipating it altogether, there remains nothing to be the subject of a trust." Wood, V. C., in *Frith v. Cartland*, 2 H. & M. [Eng.], 417. In such case, *cestui que trust* has no specific claim against any property or fund. He is merely a creditor of the trustee, and stands on the same basis as other creditors. The right to a preference is

based on his ownership of some specific fund or assets, or on a claim or charge upon all the fund or assets, because his property is contained in, or has contributed to, them. In other words, to obtain a preference, *cestui que trust* must show that the estate out of which he claims such preference has been increased to some extent by the misappropriation of the trust property, and he is entitled to a preference to the extent of such increase only. This proposition in no way detracts from, and is but another way of stating, the general rule, announced in the cases cited, that where a trustee mingles trust moneys with his own funds, *cestui que trust* is entitled to a charge upon the whole, and, so long as any portion of the mass into which the trust fund has entered remains in any form, it is subject to such charge and may be followed and claimed. In *State v. Bank of Commerce and Morrison v. Lincoln Savings Bank & Safe Deposit Co.*, it was held that the burden is upon *cestui que trust* to show that the trust money did in fact increase the estate out of which he seeks a preference, or is represented therein in some form. This is only to say that a plaintiff must prove his case. He claims a specific fund as his, or he claims a charge on the general mass of assets, and he must show the facts to justify his claim. But we think this should not be pushed too far. When it is once proved that trust money has gone into the general estate of a trustee who afterwards becomes insolvent, it would seem that we ought to presume, in the absence of other evidence, that it remains therein at his insolvency, and that we ought not to say it can not be traced, or has wholly disappeared, where the contrary may fairly be inferred. *Sherwood v. Central Michigan Savings Bank*, 103 Mich., 109, 61 N. W. Rep., 352; *Independent District v. King*, 80 Ia., 497, 45 N. W. Rep., 908. In the case at bar the city showed that its money was put into and became part of the general fund of "cash on hand" in the bank. It appeared also that the receiver came into possession of cash or "cash items" amounting to some \$2,000. If these facts stood alone, we

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should feel obliged to allow the city a preference to the extent of what came into the receiver's hands when he took possession. *State v. Bank of Commerce*, 54 Nebr., 725. But as the evidence stands, it is clearly proved that the cash and cash items taken over by the receiver do not represent the city's money in any form. The city's money entered into, and was part of, the \$41,000 cash on hand on April 9, 1895. The city had a charge on that fund for its money. Whatever moneys were drawn out of that fund and dissipated are presumed to be those of the bank. The portion that remains in the bank, in whatever form, is taken to be and represents the trust fund, and to be liable to be followed and claimed as such by the city. But if the whole of the cash on hand into which the city's money entered, or a greater portion thereof than that representing the bank's own money, was used in paying off other depositors or in running expenses, the city is not entitled to a preference over general creditors for the amount of its money so lost. *Morrison v. Lincoln Savings Bank & Safe Deposit Co.*, 57 Nebr., 225; *Matter of Carin v. Gleason*, 105 N. Y., 256; *Collins v. Stenart*, 58 N. J. Eq., 392, 44 Atl. Rep., 467; *Ellicott v. Kuhl*, 60 N. J. Eq., 333, 46 Atl. Rep., 945.

All of the cash on hand after the city's money became mixed therein, with the exception of the \$1,750 used in the purchase of warrants, which will be considered presently, and the \$200 in the bank when it suspended, was used in paying debts and expenses. The \$200, as has been seen, was pledged to indemnify sureties on the bank's bond, was afterwards paid on the judgment superseded thereby, and never came into the receiver's control. In other words, except said sum of \$1,750, it was wholly dissipated. Although there are decisions to the effect that the mere fact of use of the money in the trustee's general business or in paying his debts is, in effect, an increase of the assets, and suffices to create a charge thereon, that position is entirely at variance with the principle by which such cases must be governed, and is repudiated by all the

later authorities. *Spokane County v. First Nat. Bank*, 29 U. S. App., 707, 68 Fed. Rep., 979; *Metropolitan Nat. Bank v. Campbell Commission Co.*, 77 Fed. Rep., 705; *Boone County Nat. Bank v. Latimer*, 67 Fed. Rep., 27; *Bircher v. Walther*, 63 S. W. Rep. [Mo.], 691. As the court said in *Spokane County v. First Nat. Bank*, *supra*, "Even if it is proven that the trust fund has been but recently disbursed, and has been used to pay debts that otherwise would be claims against the estate, there would be manifest inequity in requiring that the money so paid out should be refunded out of the assets, for, in so doing, the general creditors, whose demands remain unpaid, are in effect contributing to the payment of the creditors whose demands have been extinguished by the trust fund." Moreover in this case the money which came into the hands of the receiver when he was appointed was the proceeds of loans made before the city's money came into the bank. For reasons already stated, it must be manifest that property or assets of the insolvent trustee acquired before, or with the proceeds of property held before, the trust money came into his hands, and not in any way mingled therewith, are not subject to any lien or claim in *cestui que trust*, and that the rights of the latter with respect thereto are those of a general creditor only. *District Township of Eureka v. Farmers' Bank*, 88 Ia., 194, 55 N. W. Rep., 342.

We come now to the money derived from sale of the warrants. It will be remembered that after the city's money came into the bank it bought the warrants, using \$1,750 of the moneys in which the funds of the city had been mixed, and \$35,000 borrowed on security of the warrants. The receiver contends that since there was over \$40,000 in cash in the bank at the time, of which but \$6,000 belonged to the city, it will be presumed that the \$1,750 was the bank's own money. Such would be the case, without doubt, had the bank withdrawn the money and dissipated it in some fashion. But it did not do this. It merely changed the form of a portion of the fund in which

the city's money had been wrongfully mixed. After purchase of the warrants, said fund was represented by the cash still in the bank, and by the bank's interest in the warrants. State warrants are readily convertible into cash. If the bank preferred to keep part of its cash fund as warrants, the identity of the fund was not changed. So long as any portion of the fund into which the city's money entered may be traced into money which came to the receiver, the city may assert the claim which it had upon the whole fund. The warrants were all that remained of that fund. In accordance with the presumption that whatever was retained and not dissipated was the city's money and not the bank's, these warrants and their proceeds in the hands of the receiver represent money to which the city has a prior claim, and in which general creditors have no right to share. The city's right to follow the money does not fail because no one can say what part of the cash on hand in the bank went into the warrants. The city had a charge upon the whole in any form in which the bank might keep it. When all was wasted except the warrants, that charge remained upon them, because they were a part of that fund, though in an altered form. *Knatchbull v. Hallett*, 13 Ch. Div. [Eng.], 696; *Importers & Traders' Nat. Bank v. Peters*, 123 N. Y., 272; *Byrne v. McGrath*, 130 Cal., 316, 62 Pac. Rep., 559; *Farmers & Mechanics' Nat. Bank v. King*, 57 Pa. St., 202; *Smith v. Combs*, 49 N. J. Eq., 420, 24 Atl. Rep., 9; *Third Nat. Bank v. Stillwater Gas Co.*, 36 Minn., 75, 30 N. W. Rep., 440. We do not think this view of the transaction in question conflicts in any way with the holding of Bradley, J., in *Frelinghuysen v. Nugent*, 36 Fed. Rep., 229, followed in *Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S., 54, and *Peters v. Bain*, 133 U. S., 670, and approved in *Morrison v. Lincoln Savings Bank & Safe Deposit Co.*, 57 Nebr., 225. In *Frelinghuysen v. Nugent* the cashier of a bank had wrongfully turned over large sums to a partnership engaged in manufacturing, under such circumstances as to make the latter constructive trust-

tees. The evidence indicated that the money had been entirely dissipated, and there was nothing to show that the stock on hand represented the trust fund, or a fund with which it had been mixed in any form. On the contrary, it was clear that said stock had been bought recently on credit, and represented the debts of general creditors. But in the case at bar a portion of the fund into which the city's money entered is traced directly into the warrants, in which form that portion was held till the bank suspended. The warrants were a cash asset, and the money thus held was still fairly to be called a part of the cash fund. It was not made away with, and it came into the receiver's hands, on sale of the warrants, as the last remnant of the fund with which the city's money had been mixed. The city had a charge upon the warrants, as upon the fund with a portion whereof they were bought, for the full amount of its moneys contained in said fund. Hence its claim upon the proceeds is not limited to the \$1,750 which was used in buying them, but extends to the profit accruing therefrom, as well. The \$3,334.37 which came into the hands of the receiver upon sale of the warrants, represents the cash fund in which the city's money was mixed, and the profits of an investment of that fund. The profits of trust money belong to *cestui que trust*, and we see no warrant for limiting recovery to the actual sum invested, especially when there is not enough, in any event, to satisfy the charge on the original fund. *Farmers & Traders' Bank v. Kimball Milling Co.*, 1 S. D., 388, 402, 36 Am. St. Rep., 739; *Brown v. Ricketts*, 4 Johns. Ch. [N. Y.], 303; *Frank's Appeal*, 59 Pa. St., 190; *Butler v. Hicks*, 11 Smed. & M. [Miss.], 78.

We therefore recommend that the order of the district court be reversed, and the cause remanded with directions to enter a new order granting the city a preference to the extent of the proceeds of said warrants, namely, \$3,334.37.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing

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opinion, the order of the district court is reversed and the cause is remanded with directions to enter an order granting the plaintiff in error a preference to the extent of \$3,334.37.

REVERSED AND REMANDED.

MARY A. TOPPING, APPELLANT, V. JOHN JEANETTE ET AL.,
APPELLEES.

FILED MAY 21, 1902. No. 11,718.

Commissioner's opinion, Department No. 2.

1. **Reformation of Written Instrument: EVIDENCE OF MISTAKE.** In order to justify reformation of a written instrument in any substantial particular, the evidence of mistake must be clear, convincing and satisfactory.
2. ———: ———: **REASONABLE DOUBT: EVIDENCE.** But it is not required that mistake be shown beyond a reasonable doubt; and where the extrinsic evidence is full, unequivocal and satisfactory, the terms of the instrument alone will not suffice to sustain a decree denying reformation.

APPEAL from the district court for Otoe county. Heard below before JESSEN, J. *Reversed.*

John C. Watson, Robert Ryan and John V. Morgan, for appellant.

James W. Eaton and Alva L. Timblin, contra.

POUND, C.

This is a suit in equity for reformation of a mortgage executed and delivered by plaintiff and her husband to one Eugene Cusson, now deceased, whose executors are defendants. The plaintiff alleges in her petition that the mortgage in question was executed and delivered to said Cusson to secure a debt due the latter from William Topping, her husband; that she signed the note merely as surety for her husband; that at the time the mortgage was executed, her husband was the owner of certain prop-

erty in Nebraska City, specifically described, which property and none other was intended to be included in the mortgage given to secure payment of said indebtedness; that the conveyancer who drew the mortgage by mistake included therein, in addition to her husband's said property, lot 1, in section 31, township 8, range 15, Otoe county, which was and is her separate property, and was not intended to be mortgaged; that she did not read the mortgage, nor was it read to her before she signed and acknowledged it, but she was informed and supposed that she was signing a mortgage on her husband's property alone; that neither she nor the mortgagee intended that the lien should extend to her own private property; and that her said separate property was included in the mortgage by mutual mistake of the parties. The defendants filed a general denial, and also a plea of the statute of limitations. But the latter is defective in form and without support in evidence, so that we need not consider it. The court found generally for the defendants, and dismissed the suit.

It appears in evidence that William Topping, husband of plaintiff, owned certain property in Nebraska City. Plaintiff was the owner of a farm six or seven miles distant from the city, which was her separate property. Mr. Topping applied to two loan brokers for a loan of \$500, which he offered to secure by a mortgage upon his Nebraska City property. One of the brokers proposed the loan to the mortgagee, telling him that it would be secured by mortgage upon said city property, and the mortgagee consented to make the loan, and did so. There was a prior mortgage called the "Roddy mortgage" upon both tracts. One of the brokers, in drawing the mortgage, copied the description from the Roddy mortgage, being misled, apparently, by the fact that the city tract was described by metes and bounds, while the farm land bore the unusual designation of "Lot 1," etc. Mr. Topping testifies positively that he did not know his wife's property was included, and that the instrument was not read to her

before she signed it. The plaintiff testifies to the same effect; and also that she was told by the notary the instrument was a mortgage on the city property, and that she would not have signed it had she known her land was included. The notary does not dispute this testimony.

We do not think the finding of the lower court can stand. Undoubtedly, in order to justify reformation of a written instrument in any substantial particular, the evidence of mistake must be clear, convincing and satisfactory. *Slobodisky v. Phenix Ins. Co.*, 52 Nebr., 395; *Home Fire Ins. Co. v. Wood*, 50 Nebr., 381; *Schrimer v. Chicago, M. & St. P. R. Co.*,* 82 N. W. Rep. [Ia.], 916; *Potter v. Potter*, 27 Ohio St., 84. This statement must not be misunderstood. It is often said that the mistake must be established indubitably or beyond a reasonable doubt. Such is not the rule in this state. A preponderance of the evidence is all that is required in any civil action. The express terms of a written instrument, or the relations of the parties concerned therein, may raise such presumptions that proof of more than ordinary cogency is required to create a preponderance. Until overcome by clear and convincing proof, the terms of the instrument stand as evidence of the intention of the parties. *Doane v. Dunham*, 64 Nebr., 135; *Stall v. Jones*, 47 Nebr., 706. This is as far as the rule goes. Where the extrinsic evidence is full, unequivocal and satisfactory, the terms of the instrument alone will not suffice to sustain a decree denying reformation. It can not be said that there has been a finding on conflicting evidence, within the meaning of the established rule of this court, in such a case. In the case at bar, the evidence is very clear and full. The conveyancer tells us that he copied the description from the Roddy mortgage, which included both tracts; and the two descriptions are such as to lead the reader not unnaturally to take the one as defining or explaining the other. The broker who negotiated with the mortgagee says he proposed the city property as se-

*Does not appear in 111 Iowa.—REPORTER.

curity, and the latter assented thereto. It appears, also, that the tract owned by plaintiff was then worth but little, and did not become valuable till a later date. Hence there is nothing to make it probable that her property was relied on. The testimony of plaintiff and her husband is clear and positive. The notary, on the whole, corroborates them. There is nothing to the contrary beyond the face of the instrument, a statement of the mortgagee that he had other security made long afterwards, when the city property was under foreclosure for taxes, and the fact that the Roddy mortgage, which covered both tracts, was paid about the time the one in dispute was executed. The witness who heard the mortgagee say he had other security did not understand him to refer to the tract owned by the plaintiff, and the statement is perfectly consistent with her case, since her personal liability as surety might have been meant. Mr. Topping testifies that he paid the Roddy mortgage with his own funds, and used the proceeds of the loan to buy cattle. Consequently there is no such presumption as might have arisen if the mortgage in controversy had, as it were, replaced the prior incumbrance. We are of opinion that the finding and decree are contrary to the evidence, and should be set aside. The ordinary course would be to render a new decree or to direct a decree for plaintiff in the district court. But we are not entirely satisfied with the former trial; and as it appears that a foreclosure suit is now pending, in which case, or on a new trial of this one, or upon consolidation, as the parties may be advised, the facts may be fully developed, we think the interests of justice will be subserved by remanding this cause for further proceedings only. Such course has been adopted frequently under like circumstances. *Clemons v. Heelan*, 52 Nebr., 287; *Medland v. Linton*, 60 Nebr., 249; *Nebraska Moline Plow Co. v. Fuehring*, 60 Nebr., 316.

We therefore recommend that the decree be reversed and the cause remanded for further proceedings.

BARNES and OLDHAM, CC., concur.

Goble v. Swobe.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

ALLEN E. GOBLE ET AL., APPELLEES, v. THOMAS SWOBE,
TRUSTEE, ET AL., APPELLANTS.

FILED MAY 21, 1902. No. 11,838.

Commissioner's opinion, Department No. 3.

1. Trustee: TERMS OF TRUST: BENEFICIAL INTEREST: RIGHT OF ACTION. Where a trustee refuses to carry out the terms of a trust, the party or parties beneficially interested may maintain an action in their own right to enforce the trust, and to obtain the benefit thereof.
2. Misjoinder: WAIVER. A misjoinder apparent on the face of the petition, is waived if not objected to before the trial.
3. Objection: DEMAND FOR JURY. An objection "that the court is without jurisdiction to hear a cause on the equity side of the court," is not a sufficient demand for a jury, even though the action be one at law.
4. Evidence. Evidence examined and held to support the judgment.

APPEAL from the district court for Douglas county.
Heard below before KEYSOR, J. *Affirmed.*

Hall & McCulloch, for appellants.

Charles S. Lobingier, Herbert S. Crane, L. D. Holmes
and *J. J. Boucher*, contra.

DUFFIE, C.

Milton H. Goble, the father of Allen E. and Gertrude Goble, had an interest in Bowling Green, an addition to the city of Omaha. The record discloses that he was a man of dissipated habits, and on the 18th of March, 1889,

in order to provide for his children, his friends procured him to execute and deliver the following writing:

"To W. L. Adams, Treasurer, and A. P. Woods, Trustee:

"GENTLEMEN: I have this day assigned to Thomas Swobe \$10,000. Ten Thousand Dollars of the monies coming to me out of my interest in Bowling Green, to be used by him for the benefit of my two children. You will therefore pay said sum out of any proceeds coming to me since the date of the last dividend, to Thomas Swobe taking his receipt for the same as such trustee. He alone, has authority to draw and receipt for it. Omaha, March 18, 1889.

MILTON H. GOBLE.

"Accepted March 18th, 1889.

"WM. L. ADAMS, *Treasurer,*

"ARTHUR P. WOOD, *Trustee.*"

Allen E. and Gertrude Goble are the children referred to in said writing, and their petition contains the following allegations: "The said Thomas Swobe, as trustee, accepted the said trusteeship conferred upon him by said assignment, and assumed and agreed to perform the duties of trustee, for the purposes expressed in said assignment, and in pursuance thereof collected and received from the said Adams and Wood a large sum of money, to-wit, the sum of \$480.00; subsequent to the making of said order on the 18th of March, 1889, to-wit: on December 23, 1889, and the said Swobe failed, neglected and refused to apply the said sum to the use and benefit of the plaintiffs, and wrongfully converted it to his own use." It is further alleged in the petition that \$9,180 only has been paid to the guardians of the plaintiffs for their use and benefit and there still remains due to them the sum of \$820, together with interest from the 23d of December, 1889. The district court entered judgment against Swobe for \$808.16, with interest from the first day of the May term, and against Arthur P. Wood for the sum of \$572.38, with interest from the first day of the term.

The appellants insist that the record does not support the judgment for the following reasons: "(1.) There is

no proof that any money due to the plaintiffs in this case has been withheld from them. (2.) If the order in this case is proved, then the only person having a right to control the money is Thomas Swobe, and Wood would be under no obligation to pay it to anyone else. (3.) There is no right to join Wood and Swobe in this action. (4.) There is no jurisdiction in this case on the equity side of the court."

The evidence is clear that Swobe accepted the trust, and received and paid over a large amount of the trust fund. It is undisputed that the children have now attained their majority, and, this being so, they may maintain an action in their own right and name. We think that the law is plain that where a trustee refuses to carry out the terms of the trust, the party or parties beneficially interested may maintain an action in their own right to enforce the trust and to obtain the benefit thereof. It is quite plain from the record before us that after Wood formally assumed the obligation conferred upon him by the writing above set out, by accepting the same, he received as Goble's share of the proceeds of sales of Bowling Green the sum of \$13,743.33, and of this sum he paid to Swobe \$9,660 only. This would still leave in his hands \$340 of the trust fund. Swobe paid to the children, or for their benefit, the sum of \$9,180 of the amount paid over to him, leaving \$480 still in his hands. These sums, with interest thereon, ought to be accounted for by the parties, and unless the district court committed some error in the trial of the case the judgment should be affirmed. When the plaintiffs below called their first witness, objection was made to the introduction of any evidence for the reason "that there is no jurisdiction in equity to try this case, and that the court is without jurisdiction to hear the same on the equity side of the court." The petition filed by the plaintiffs does not designate the action as one at law or in equity, and it states in a plain and concise manner the facts upon which they asked judgment against the defendants. If this is an action at law, the defendants

were entitled to a jury trial, unless their right thereto was waived. If the court regarded the case as one in equity and was proceeding to try it as such, the defendants should have moved to have it transferred to the law docket, and tried as a law action. We do not think that the objection that the court had no jurisdiction to try the case as one in equity sufficiently raised the question of their right to a jury trial. The district courts of this state, by express provisions of the statute, have jurisdiction of both law and equity actions. That a law action may have found its way to the equity side of the docket does not defeat the jurisdiction of the court to try the case, and if either party to the action desires it tried as a law action a specific request to that effect should be made upon the court. The general rule appears to be that a party waives his right to the trial of a case as a law action by a failure to move for its transfer to the law docket, when through mistake or otherwise, it has been placed upon the equity docket of the court. *Walcott v. O'Connor*, 163 Mass., 21; *Davis v. Snyder*, 45 Nebr., 415. It might also be observed that the defendants below have brought the case to this court by appeal instead of by petition in error, and that they have thus recognized the case as one in equity and can not now be heard to complain that it was not tried as a law action. It is probable that Swobe and Wood could not, against objection made, have been joined as party defendants in the action. Wood, by accepting the order made by Milton Goble, agreed to turn over \$10,000 of Goble's share of the proceeds of the sales of lots in Bowling Green to Swobe, while Swobe, by accepting the trust, became bound to account for all moneys paid him on that account to the *cestuis que trust*. If they were not properly joined in this action, the defect appeared on the face of the petition, and should have been raised by demurrer. As no objection to the misjoinder was made to the trial court, it has been waived and can not be urged as reversible error. *Snowden v. Tyler*, 21 Nebr., 199. We think the evidence ample to support the

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judgment. Both Swobe and Wood in conversation had with one of plaintiff's witnesses, recognized their liability for the amount sued for, and promised to settle it as soon as another action which involved Goble's interest in the Bowling Green addition had been determined.

Finally it has been suggested that no present vested interest in this fund was conveyed to Allen and Gertrude Goble by the writing of March 18, 1889. We do not think that this contention can be sustained. In *Eaton v. Cook*, 25 N. J. Eq., 55, it is said: "It is not necessary to a trust that there should be any transfer of property, whether the fund be in the possession of the donor or of another; the property may still remain as it was, and the donor may constitute himself as the possessor, trustee of it. If a person, by a written instrument, or by word, directs his debtor to hold the money due, in trust for a third person, and such direction is communicated to the debtor, an effectual trust in favor of the donee is created, especially where, as in this case, the debtor has acted on the direction and consented to the arrangement."

Some technical questions are raised as to the sufficiency of the answer filed by the defendants in this case. As the case has been correctly determined on its merits, we do not care to go into a discussion of technical matters of practice. Some authorities have been cited to show that an unverified answer does not present any issue for the trial court, especially where the defendants have not offered evidence in support of the allegations of such answer. This rule may be technically correct, but, as the plaintiffs filed a reply to the answer filed in this case, we do not think that they stand in a position to take advantage of such technicality. Believing that the case was correctly determined on its merits, we recommend that the judgment of the district court be affirmed.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

WALTER T. GORE V. JOHN IZER.

FILED MAY 21, 1902. No. 11,816.

Commissioner's opinion, Department No. 3.

Conversion: WRONGFUL SALE: DEFENDANT'S CONTROL: KNOWLEDGE OF PLAINTIFF'S RIGHTS. [It is not necessary to the maintenance of an action for conversion, by reason of the wrongful sale of a plaintiff's goods, to show that defendant exercised control over the property with knowledge of the plaintiff's rights, or that a demand was made for the goods, while they were in defendants possession. *Pease v. Smith*, 61 N. Y., 477.]

ERROR to the district court for Gage county. Tried below before LETTON, J. *Reversed.*

W. H. Richards and *A. H. Babcock*, for plaintiff in error.

R. W. Sabin, *contra.*

AMES, C.

This is an action for the conversion of a hog of the alleged value of \$13.65. If the hog was converted by the defendant, there is evidence tending to show that the fact was accomplished by mistake in this manner: Both parties had a considerable number of animals in the same enclosure. On the day on which the offense is charged as having been committed, the defendant shipped his hogs on board the cars to market. Immediately, at least soon, thereafter the hog in question was missed. It is not unlikely that it became mixed with the defendant's hogs, and was shipped and sold by him without his knowledge, although he denies that such was the fact, and the evidence bearing upon the point is conflicting. The jury returned a verdict for the defendant, under the usual instructions defining conversion as consisting in the unlawful disposing of or appropriating to his own use by one

man of the property of another. But the plaintiff asked that the court give also the following instruction:

"The jury are instructed that the conversion of property may be shown by the exercise or control over the same, inconsistent with the right of the owner, and by depriving him of its possession, without regard to the intent with which the act is done. If you find from the evidence that on the 31st day of May, 1898, the defendant had for shipment sixty-five (65) head of hogs, in the stock yards at Liberty, Nebraska, and the plaintiff had sixteen (16) head of hogs, in said yards during said day, and that said hogs became mixed, as defendant was loading his hogs through the chute into the car, and when separated, only fifteen head of hogs were in plaintiff's enclosure and delivered to him, in said separation, and that the defendant loaded the hog described in plaintiff's petition with his hogs on the car, and shipped and sold the same with his hogs and converted the money to his own use, then he is guilty of conversion."

This instruction is criticised for failure to state the number of hogs belonging to the respective parties accurately; but that, we think, is a matter of no importance. It recites correctly a proposition of law which is applicable to a state of facts which the jury might have found from the evidence to have existed. Its equivalent was not given by the court, and we think its refusal was, under the circumstances, erroneous. The jury may not unlikely have inferred from the use of the words "wrongful" and "unlawful" in the pleadings and in the instructions given, that an actually wrongful purpose in the act of taking is an essential element in a conversion. Such is not the law. 2 Greenleaf, Evidence, secs. 636-642; 21 Ency. Pl. & Pr., 1018, and note. *Pease v. Smith*, 61 N. Y., 477; *Spooner v. Manchester*, 133 Mass., 270-273. And we think that in a case like this the plaintiff had a right to have any probable cause for misapprehension by the jury removed by instructions. There are other errors assigned, but we do not think it necessary to decide upon them.

Thom v. Dodge County.

It is recommended that the judgment of the district court be reversed and a new trial granted.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and a new trial granted.

REVERSED AND REMANDED.

ALEXANDER THOM V. COUNTY OF DODGE.

FILED MAY 21, 1902. No. 11,843.

Commissioner's opinion, Department No. 3.

1. **Statutory Bond: OBLIGOR: INTEREST OF WITNESS: BOND AS EVIDENCE.** When, for the purpose of showing the interest of a witness, it has been proved that he is one of the obligors upon a statutory bond, the terms and obligations of which are matters of common knowledge, it is not error to refuse to admit the bond itself in evidence.
2. **Instructions: ISSUES: EVIDENCE: QUESTIONS OF FACT.** It is error to submit to a jury by instructions questions of fact not embraced in the issues, or concerning which there is no evidence.
3. **Land-Owner: PUBLIC ROAD: INCIDENTAL DRAINAGE.** A land-owner, through or adjacent to whose lands is constructed and maintained a public road, has a right to such advantage from it by way of drainage, as is incidental to its existence, and does not inconvenience the public or individuals, or injure the public work.

ERROR from the district court for Dodge county. Tried below before GRIMISON, J. *Reversed.*

Enos F. Gray and George L. Loomis, for plaintiff in error.

Grant G. Martin, Robert J. Stinson, Clark C. McNisk and Frank Dolezal, contra.

AMES, C.

This is a proceeding under chapter 89 of the Compiled Statutes to obtain a right of way for a drainage ditch across a tract of land belonging to the plaintiff in error. An appeal was taken to the district court from an assessment of damages by the county board. In the course of the trial three errors are alleged to have intervened, which the plaintiff in error seeks to have corrected by this court.

1. It was disclosed on the trial that two of the witnesses adverse to the plaintiff in error were petitioners for the construction of the ditch, and had signed the bond prescribed by section 16 of article I of the chapter, so as to enable the work to be prosecuted during the pendency of the appeal. The plaintiff in error, for the purpose, as he says, of showing the interest of the witnesses, then offered the bond itself in evidence, but the offer was denied. We do not see that he was prejudiced by the ruling. The execution and delivery of the bond in conformity to the statute, were admitted. Its terms and conditions and the obligation it imposed upon the witnesses are, therefore, matters of common knowledge, and no useful purpose would have been served by making the instrument itself a part of the record.

2. The court, at the request of the county, instructed the jury that, if the ditch "will form an outlet for lateral ditches on plaintiff's land, and thereby provide a means of draining plaintiff's lands * * * this would be a special benefit to plaintiff's lands, which you are permitted to consider in determining the question as to what extent his land is benefited by said proposed ditch." It does not appear that the construction of any lateral ditch upon the plaintiff's land was contemplated as a part of the improvement in question or otherwise, nor is there any evidence that the land was capable of drainage by that means. The instruction seems, therefore, to be clearly obnoxious to the familiar rule in this court against

submitting to a jury by instructions questions of fact not embraced in the issues, or concerning which there is no evidence. The defendant in error seeks to uphold the instruction as having reference to such furrows and channels upon the surface of the land as are incidental to its cultivation, but this interpretation is manifestly too far-fetched. By common understanding a lateral ditch to a drainage ditch is itself a ditch especially constructed for the purposes of drainage.

3. Along the margins of the plaintiff's lands were certain public roads at the sides of which were the usual borrow pits or road ditches, which served or might serve, to some extent, to relieve the lands of surface water. The jury were instructed, at the request of the county, that these ditches were constructed exclusively for the drainage of the road, and that no person has a right to use them for the drainage of land, and that in considering the question of benefits, they were not to consider that the plaintiff had any vested right to the use of such ditches and the road grades for the drainage of his land. We think this instruction is somewhat broader than was warranted. Precisely what was meant by "vested right" we do not know, but we think that, so long as the road is maintained, the plaintiff has a right to such advantage from it, by way of drainage of his land, as is incidental to its existence and does not inconvenience the public or individuals or injure the public work. So far as appears, the road is likely to be maintained perpetually in substantially its present condition. If such drainage as is incidental thereto and does not injure or inconvenience the public or individuals, suffices to relieve the plaintiff's lands from surplus water, his property will not be benefited by the building upon it of a drainage ditch. That this instruction was intended covertly to negative this idea, and that it very probably was understood by the jury as so doing, appears to us to be quite evident, and we are therefore of opinion that the giving of it was error.

Perkins v. Milton.

For these reasons we recommend that the judgment of the district court be reversed, and a new trial granted.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and a new trial granted.

REVERSED AND REMANDED.

GEORGE PERKINS ET AL. V. HELEN MILTON.

FILED MAY 21, 1902. No. 11,693.

Commissioner's opinion, Department No. 3.

Bastardy Proceedings: RECOGNIZANCE: CONDITION: RENEWAL: FAILURE TO APPEAR: LIABILITY. A recognizance in a bastardy proceeding, conditioned that the accused shall appear at the next term of the district court to answer such accusation, and abide the order of the court, is limited to the term at which it exacts the appearance, and where the case is continued to a subsequent term without a renewal of such recognizance, and the defendant fails to appear at such subsequent term, there is no liability on the recognizance.

ERROR to the district court of Saline county. Tried below before HASTINGS, J. *Reversed.*

Richard S. Norval, J. J. Thomas and George H. Hastings, for plaintiff in error.

Fayette I. Foss, John D. Pope, B. V. Kohout and R. D. Brown, contra.

ALBERT, C.

On April 6, 1897, one Herbert Perkins was given a preliminary hearing before O. G. Ellsworth, a justice of the peace in and for Saline county, Nebraska, upon a complaint filed by the defendant in error, Helen Milton,

charging him with being the father of a bastard child of which she was then pregnant. Upon this hearing it was adjudged by the justice that there was reasonable cause for the filing of said complaint; whereupon the defendant entered into a recognizance for his appearance at the next term of the district court to be thereafter held in said county, with George Perkins, H. P. King, Edwin C. Biggs and R. S. Norval, as sureties. The recognizance is in the usual form, and is conditioned "that if the said Herbert Perkins shall appear at the next term of the district court to be held in and for Saline county, Nebraska, to answer such accusation, and to abide the order of the court thereon, then this recognizance to be null and void; otherwise to remain in full force and effect." The next term of the district court for Saline county, Nebraska, convened May 10, 1897. On May 15, 1897, the May term of the district court for Saline county for that year adjourned *sine die*. The defendant in that case appeared at the next or May, 1897, term of said district court, and his father, who was one of his bondsmen, and also R. S. Norval, another of his bondsmen, likewise appeared at the same term of court. There was no order of any kind made in said bastardy proceedings during the May, 1897, term of said district court. The second term of the district court held in Saline county, after the date of the recognizance, convened on October 18, 1897. On October 29, 1897, after the trial of the said cause at the October term of said court, the jury found Herbert Perkins guilty as charged in the complaint, and on November 5, 1897, Herbert Perkins not appearing in court, the bond was declared forfeited.

The action upon the recognizance was commenced in the district court of Saline county, and is brought in the name of Helen Milton, who sues for and on behalf of Saline county, against Herbert Perkins, George Perkins, Horace P. King, Edwin C. Biggs and Richard S. Norval. There was no service of summons on the defendant Herbert Perkins in this action, and he made no appearance therein.

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Before the case was tried in the district court, Edwin C. Biggs died, and no revivor was ever had in the action against his estate, and no judgment was rendered against him or his estate. The action proceeded against the other defendants. A trial to the court resulted in a finding and judgment for the plaintiff. The defendant brings the case here on error.

The judgment in this case can not stand, because the liability of the defendants on the recognizance ended when the defendant appeared at "the next term of the district court." *State v. Murdock*, 59 Nebr., 521; *Hesselgrave v. State*, 63 Nebr., 807. It is urged that there were reasons for not trying the case at the term at which the defendant was bound to appear, but we are unable to see how that has any bearing on the liability of the defendant on the recognizance. The terms of the recognizance did not require the defendant in the bastardy proceedings to appear from term to term until it was possible or convenient to try the case, but to appear at the next term. If for any reason the case could not be tried at that term, the means were at hand whereby the prosecution might have secured the attendance of the defendant at a subsequent term. A failure to employ such means does not extend the liability of the defendant in this case. There is some question whether the plaintiff had legal capacity to maintain this action. On that question we express no opinion.

It is recommended that the judgment of the district court be reversed, and the cause remanded for further proceedings according to law.

AMES and DUFFIE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded for further proceedings according to law.

REVERSED AND REMANDED.

ANDREW D. RICKETTS ET AL. V. JOHN A. BUCKSTAFF ET AL.

FILED MAY 21, 1902. No. 11,854.

Commissioner's opinion, Department No. 3.

1. **Written Contract: CONSTRUCTION: REJECTION OF CERTAIN WORDS: INTENTION OF PARTIES.** A construction of a written contract, which requires the rejection of certain words, is unwarranted where the rejection of such words would defeat the intention of the parties.
2. **Sufficiency of Tender: OBJECTIONS.** Where the question of the sufficiency of a tender arises in the course of the trial of a cause, and it appears that such tender was rejected on specific grounds, other objections to the tender will not be considered.

ERROR from the district court for Lancaster county.
Tried below before HOLMES, J. *Reversed.*

Ricketts & Ricketts, for plaintiffs in error.

Charles O. Whedon, contra.

ALBERT, C.

This is an action in replevin, brought to recover possession of 7,600 bales of hay. The legal title of the plaintiffs to the property is conceded. The defendants claim the right of possession by virtue of a lien for storage. That the property was delivered by the plaintiffs to the defendants for storage, and stored by the latter, is also conceded. The plaintiffs allege payment of a part of the charges for storage, and a tender of the balance. The defendants insist that the tender was insufficient in amount. The cause was submitted to the court without a jury. There was a finding and judgment for the defendants. The plaintiffs bring the record here for review.

Whether plaintiffs' tender was sufficient in amount depends upon the construction to be placed on the contract of the parties. The contract was reduced to writing, and is as follows:

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"LINCOLN, NEB., September 12, 1894.

"*A. D. Ricketts & Co., City:*

"GENTLEMEN—We will receive and store for you twenty-five or more cars of hay in bales, on the following terms and conditions: For all hay received on track at our warehouse, cor. 6th and L sts., in this city, we will receive and store for you at the following rates: For one Mo. or fraction thereof two cts. pr. Mo. per bale of 75 lbs. For two Mo. or fraction thereof one & one-half cts. per Mo. pr. bale of 75 lbs. For three Mo. or fraction thereof one & one-fourth cts. pr. Mo. per bale of 75 lbs. For four Mo. or fraction thereof one ct. per. Mo. pr. bale of 75 lbs. For five Mo. or fraction thereof three-fourths cts. pr. Mo. pr. bale of 75 lbs. For six Mo. or fraction thereof five-eighths cts. pr. Mo. pr. bale of 75 lbs.

"If the average weight is above or below 75 pounds per bale, then we are to receive the same proportionate weight per bale as above specified, we to keep an accurate account of the number of bales received and make deliveries only on your written order. We to hold ourselves responsible for any shortage in bales not accounted for by your orders, except loss by fire or the elements.

"When deliveries are made to your team at our warehouse you to furnish one-half the labor to load the same. We to load in cars at our warehouse all hay shipped out in car lots.

"Payment for the previous month's storage to be made on the first of each month.

"NEB. IMPL. & FORWD. Co.,

"Per J. F. BARR.

"Accepted, A. D. RICKETTS & Co.

"Signed in duplicate.

"We will haul all your hay from the Rock Island freight depot to our warehouse for the sum of twenty-two and one-half (22½) cts. per ton.

"NEB. IMP. & F. Co.,

"By J. F. BARR."

The defendants insist that a proper construction of the contract would entitle them to 2 cents per bale for the first

month, $1\frac{1}{2}$ cents per bale for the second month, and so on, so that the total charges for six months would be $7\frac{1}{3}$ cents per bale. We do not think the instrument will admit of that construction. The defendants' offer was, not to store the hay the first month for 2 cents for each bale, the second month for $1\frac{1}{2}$ cents a month per bale, and so on, but to store it one month for 2 cents per bale, two months for $1\frac{1}{2}$ cents a month per bale, etc. Each rate fixed by the offer, is, by the terms of the instrument, a rate per month. To adopt the defendants' construction, would require the rejection of the phrase "per month," which runs throughout the offer. That phrase is so clearly a part of the contract that its rejection would be setting at naught the manifest intention of the parties, which is permissible under no canon of construction of which we have knowledge. The plaintiffs insist that by the terms of the contract the storage charges were uniform for the whole number of months the hay was left in storage; that is, if left in storage one month the charges would be 2 cents per bale, two months $1\frac{1}{2}$ cents per bale per month, and so on. The defendants suggest a difficulty in the way of the adoption of this construction, and that is that the contract provides for the monthly payment of storage, and that, as the contract is silent as to the number of months the hay was to be kept in storage, it would be impossible to ascertain, at the end of each month, the amount due for the preceding month. That objection would be entitled to great weight were we compelled to confine ourselves to the writing itself; but it must be kept in mind that the question under investigation is the sufficiency of the tender made by the plaintiffs. The evidence shows that in March, 1895, the defendants notified the plaintiffs that the contract would expire on the first day of the succeeding month, which would be six months from the date the hay was delivered for storage. In making their tender, the plaintiffs had a right to adopt the defendants' construction of the contract as to the time it was to run. The defendants, having signified their construction of the contract in this

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particular, are in no position to complain if the plaintiffs, in making their tender, adopted that construction as the basis of their computation of the amount due. Under this construction of the contract the storage charges for the entire six months would be \$285. Of this amount \$76 was paid about the 1st of November, 1894. From that date, at different times, the plaintiff tendered the amounts falling due, computed on the basis of a six-months' contract. The final tender was made on the 18th day of March, 1895, and was \$209, which, added to the \$76 hereinbefore mentioned, covered the entire amount of storage charges for the entire period. The defendants now object to some of the tenders on the ground that they were made by check, and were not unconditional. No such objection was urged against the tenders when made. They were objected to on the sole ground that under the construction placed upon the contract by the defendants hereinbefore mentioned the amount tendered was insufficient. It is well settled that where a tender is rejected on one ground, other objections thereto are waived. The plaintiffs, having paid a part of the storage charges and made due tender of the balance due, under a proper construction of the contract, were entitled to the possession of the hay, and the judgment of the district court is erroneous.

It is therefore recommended that the judgment of the district court be reversed, and the cause remanded for further proceedings according to law.

AMES and DUFFIE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

UNITED STATES NATIONAL BANK OF HOLDREGE V. PER
FORSTEDT.

FILED JUNE 4, 1902. No. 11,922.

Bank: OTHER CORPORATION: NOTICE OF CHARACTER OF TRANSACTION:
PERSONNEL OF WORKING FORCE. The rule is well settled that a bank or other corporation, being once charged with notice of the character of a transaction, continues to be affected by such notice, whatever changes may occur in the personnel of its working force.

ERROR from the district court for Phelps county, Tried below before ADAMS, J. *Affirmed.*

Clency St. Clair and *Charles St. Clair*, for plaintiff in error.

A. J. Shafer, contra.

PER CURIAM.

This was an action by Per Forstedt against the United States National Bank of Holdrege to recover the penalty provided for in section 5198 of the national banking act. In our opinion there is no fairly debatable question in the case. The jury were well warranted in finding that the defendant knowingly contracted for and received interest in excess of ten per cent., and that the amount so received was at least fifty per cent. of the verdict and judgment. The contention of counsel for the bank that the bank officers who actually received the last payments upon the usurious contract were not connected with the bank at the time the contract was made, and were therefore ignorant of the fact that it was tainted with usury, is, of course, without merit. The rule is that a bank or other corporation, being once charged with notice of the character of a transaction, continues to be affected by such notice what-

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ever changes may occur in the personnel of its working force.

The decision of the court is manifestly right and is

AFFIRMED.

NOTE.—*Notice to Corporation*.—A corporation can not receive information or notice of any fact but through the senses of the members composing the corporation. Underwood, J., in *Lyne v. Bank of Kentucky*, 5 J. J. Marsh. [Ky.], 545, 559.—REPORTER.

JOSEPH S. HART, APPELLEE, v. MICHAEL McDONNELL, APPELLANT.

FILED JUNE 4, 1902. No. 11,955.

1. **Sheriff: SALE OF REAL ESTATE: CERTIFICATE OF LIENS: AUTHORITY.**

The authority of a sheriff or other officer to sell real estate under a decree of foreclosure, does not depend upon the procurement and filing of certificates of liens.

2. **Judicial Sale: LIENS: CONFIRMATION.** Where property brings at judicial sale two-thirds of its gross value, the sale should be confirmed notwithstanding the failure of the sheriff to file in the office of the clerk of the district court in due time the treasurer's certificate showing the amount of a tax lien.

APPEAL from the district court for Gosper county.
Heard below before NORRIS, J. *Affirmed.*

Webster S. Morlan, for appellant.

John T. McClure, contra.

PER CURIAM.

This is an appeal from an order of the district court of Gosper county confirming a sale of real estate made by the sheriff of said county under a decree of foreclosure. The only ground upon which counsel rely for a reversal of the order is that the treasurer's certificate, showing a lien for taxes upon the property in question, was not filed in the office of the clerk of the district court until the day

of the sale. It appears to be conclusively established by the record that the sheriff applied to the treasurer and obtained from him a certificate showing that there was a tax lien upon the property amounting to \$5.57, and that the amount of such lien was deducted from the gross value of the land, but that the certificate was not filed until the day of the sale. Notwithstanding this irregularity, we think, upon the admitted facts, the sale was properly approved and that the order of confirmation should be affirmed. The authority of the sheriff to make the sale did not depend upon the procurement and filing of the certificates of liens. That proposition is thoroughly established by the decisions of this court. *Craig v. Stevenson*, 15 Nebr., 362; *Smith v. Foxworthy*, 39 Nebr., 214; *American Investment Co. v. McGregor*, 48 Nebr., 779. The sheriff having, according to these cases, authority to sell, the only question to be considered is whether the owner of the equity of redemption was prejudiced by the irregularity of which he complains. The rule is well established that the failure of appraisers to deduct liens affords no sufficient ground for vacating the sale, where it appears that the property sold for two-thirds of its gross value. *La Selle v. Nicholls*, 56 Nebr., 458; *Bernheimer v. Hamer*, 59 Nebr., 733. The property here in question did sell for two-thirds of its gross value, and, since the appellant would not have been injured if the appraisers had failed to deduct the lien or had wrongfully deducted it, we are unable to perceive how the failure to file, in the office of the clerk of the district court, evidence of the existence of the lien could furnish any just ground for complaint.

The order of confirmation is

AFFIRMED.

NOTE.—*Sheriff.—Execution Sale.*—At a judicial sale, the sheriff simply sells the property of the defendant in the thing, whatever that property may be; and warrants nothing; either as to title or quality. The rule of *caveat emptor* applies *sine cera*. *Hart v. Hampton*, 7 T. B. Monroe [Ky.], 381, 18 Am. Dec., 186.—REPORTER.

BEDA C. NOREEN v. LOUIS P. HANSEN.

FILED JUNE 4, 1902. No. 11,982.

1. **Married Woman: LIABILITY FOR NECESSARIES: EXECUTION AGAINST HUSBAND: BILL OF RIGHTS.** The statute (Compiled Statutes, ch. 53, sec. 1) making the property of a married woman liable for the payment of all debts contracted for necessities furnished to her family after execution against her husband for such indebtedness has been returned unsatisfied, is not in conflict with section 3 of the bill of rights.
2. **Married Woman's Act: EXECUTION AGAINST HUSBAND: RETURN NULLA BONA: LIMITATION.** In cases arising under the proviso of section 1 of the married woman's act, the cause of action does not arise, and the statute of limitations does not begin to run, until an execution upon a judgment against the defendant's husband has been returned unsatisfied.
3. **Evidence.** Evidence examined, and found sufficient to sustain the judgment.

ERROR from the district court for Dodge county
Tried below before GRIMISON, J. *Affirmed.*

Fred W. Button, for plaintiff in error.

C. E. Abbott, *contra*.

PER CURIAM.

This action, by Louis P. Hansen against Beda C. Noreen, based upon the proviso of section 1 of the married woman's act (Compiled Statutes, ch. 53), was tried without a jury and resulted in a finding and judgment in favor of the plaintiff. The petition alleges that Andrew F. Noreen and Beda C. Noreen are husband and wife; that the plaintiff sold and delivered to them groceries for consumption in their family; that said groceries were necessities; that a judgment for said groceries was recovered against Andrew, and that an execution issued on such judgment had been returned unsatisfied. The defenses pleaded in the answer are (1) that the statute is unconstitutional; (2) that the statute of limitations has run against the action;

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and (3) that the evidence fails to show that the judgment against Andrew was for necessities.

The defendant has failed to point out any reason to support her contention that the legislature is without power to impose upon a married woman the duty of providing for herself and those constituting the members of her family, and we are not aware of any provision of the constitution with which this statute is in conflict. Its validity has been recognized in at least three decisions of this court. *George v. Edney*, 36 Nebr., 604; *Small v. Sandall*, 48 Nebr., 318; *Fulton v. Ryan*, 60 Nebr., 9.

The contention that the statute of limitations has run against the action can not be sustained. The liability of a wife under the statute is secondary; she is a surety for her husband, and the cause of action does not arise against her until an execution based upon a judgment against her husband has been returned unsatisfied. *Frost v. Parker*, 21 N. W. Rep. [Ia.], 507.

The claim that the evidence does not support the finding and judgment is grounded entirely upon the evidence of the defendant and her husband that the groceries in question were furnished to Mr. Noreen to enable him to conduct a boarding house. There is evidence tending to show that the Noreens kept boarders, but inasmuch as it is conceded that the Noreen family consisted of six persons, and that the entire grocery account amounted to only about \$10 per month, we are satisfied that the court did not err in holding that the groceries furnished were necessities for the family, within the meaning of the statute.

The judgment of the district court is

AFFIRMED.

NOTE.—*Husband and Wife.—Married Woman.*—Under a statute which provides that “either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might, if unmarried,” a married woman is authorized to execute a promissory note with her husband; and she is liable thereon, though the note is given for the individual debt of her husband. *Miller v. Purchase*, 5 S. Dak., 232.—REPORTER.

GEORGE W. LEIDIGH V. ELIZABETH J. PRIBBLE.

FILED JUNE 4, 1902. No. 11,867.

1. **Appeal-Undertaking: NON-RESIDENT SURETY: VALID AND EFFECTIVE.** An appeal-undertaking given under section 1007 of the Code of Civil Procedure is valid and effective, although the only surety by whom it was executed is a non-resident of the county in which the action is pending.
2. ———: ———: **ACTION ON UNDERTAKING: ESTOPPEL.** A party who obtains a dismissal of an appeal on the ground that his adversary failed to comply with an order requiring him to furnish a resident surety on an appeal undertaking is not, in an action upon such undertaking, estopped from asserting that the bond is valid and binding upon the non-resident surety by whom it was executed.
3. **Appeal: UNDERTAKING: SURETY: OBLIGATION.** The undertaking of a surety upon an appeal bond given under the statute relative to appeals from justices of the peace is, in substance, that he will satisfy any judgment against his principal that may result from a trial in the district court or from a failure to effectively prosecute the appeal.

ERROR from the district court for Lancaster county.
Tried below before FROST, J. *Affirmed.*

Jefferson H. Broady, for plaintiff in error.

John S. Bishop, *contra*.

SULLIVAN, C. J.

This was an action by Elizabeth J. Pribble against George W. Leidigh upon an undertaking given under the provisions of section 1007 of the Code of Civil Procedure. From a judgment in favor of the plaintiff, the defendant prosecutes error.

The facts in the case, so far as they are material to the question raised by the petition in error and discussed in the briefs of counsel, are these: Pribble sued Romine before Roberts, a justice of the peace for Lancaster county, and recovered a judgment for \$23. Romine removed the case by appeal to the district court, the statutory under-

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taking being signed by Leidigh as surety. In the district court, at the instance of Pribble, and for the reason that Leidigh was a non-resident of Lancaster county, an order was made requiring Romine to give an additional surety upon the appeal bond. This order was not complied with, and the appeal was therefore dismissed. Leidigh's defense to the present action is that the plaintiff, having obtained an order dismissing the appeal on the ground that the bond was insufficient, is now precluded from insisting that such bond is a valid and enforceable contract. In our opinion, the doctrine of estoppel has no application to the facts of this case. The plaintiff never contended that the bond was void; on the contrary, its validity seems to have been at all times conceded. The jurisdiction of the district court over the case by virtue of the appeal was never questioned. The contention of plaintiff was that she was entitled to a resident surety, and that the defendant should be denied a trial on the merits unless he furnished such surety. This view of the matter was adopted by the court and made the basis of its action. Whether the decision upon the motion to dismiss the appeal was right or wrong is not material to the question we are now considering. It is enough for our present purpose to know that the plaintiff's positions in the two cases are not inconsistent; that she is not repudiating in this case the theory on which she prevailed in the other. The defendant's undertaking was effective; it served some of the purposes for which it was given; it prevented the immediate enforcement of the judgment; it divested the justice of the peace of jurisdiction, and transferred the case to the district court for further proceedings. These things were beneficial to Romine, and prejudicial to the plaintiff. The undertaking of a surety on an appeal bond is not that he will pay if his principal is defeated in a trial on the merits, but rather that he will satisfy any judgment that may result from a trial in the district court, or from a failure to effectively prosecute the appeal. *Flanagan v. Cleveland*, 44 Nebr., 58. This is made entirely clear by section 1014 of the Code

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of Civil Procedure, which declares: "When any appeal shall be dismissed, or when judgment shall be entered in the district court against the appellant, the surety in the undertaking shall be liable to the appellee for the whole amount of the debt, costs, and damages recovered against the appellant." The order of the court dismissing the appeal ended the controversy, and gave an immediate right of action on the bond. The condition requiring the appellant to prosecute his appeal to effect was then broken, and the damages were fixed by the section of the statute above quoted. Both on principle and authority we are satisfied that the judgment of the district court is right, and should be affirmed. *Gudtner v. Kilpatrick*, 14 Nebr., 347; *Adams v. Thompson*, 18 Nebr., 541.

AFFIRMED.

PHILIP DUNN V. HARRIET BOZARTH ET AL.

FILED JUNE 4, 1902. No. 8,984.

1. **Sureties: COSTS: JUDGMENT: SUMMARY PROCEDURE: RULE 12: ERROR OR APPEAL.** The provisions of sections 612 to 616 of the Code of Civil Procedure, and especially of the latter section, do not authorize by summary proceedings the entry of a judgment for costs against sureties on a cost bond which is required to be given by the plaintiff in error or appellant under rule 12 adopted by this court, with reference to security for costs in actions brought here on error or by appeal.
2. —: —: —: —: —: —: **SCIRE FACIAS: MOTION AND NOTICE.** The court is not authorized by the issuance of a writ of *scire facias*, or on a motion and notice to the adverse party in lieu thereof, to order an execution to issue against sureties on a cost bond, given in pursuance of the provisions of rule 12, for the costs made in the action in which the cost bond was given, and which are assessed against a plaintiff in error or appellant, or for the amount thereof remaining unpaid.
3. —: —: —: —: —: **CIVIL ACTION.** The right to enforce the liability of a surety on such cost bond is by proceeding in an ordinary civil action on the undertaking and in pursuance of the rules governing civil actions generally.

ERROR from the district court for Gage county. Tried below before LETTON, J. Heard on motion for judgment against sureties on cost bond. *Motion overruled.*

Robert Ryan, for the motion.

Joseph E. Cobbey, contra.

HOLCOMB, J.

On a motion, and notice to the adverse parties, we are asked to enter judgment against the sureties on a cost bond given in pursuance of the requirements of rule 12, adopted by this court, with reference to security for costs; or, in the event the motion to enter judgment is not sustained, to issue execution against the sureties on the cost bond for the amount of the unpaid costs in the case at bar taxed against the plaintiff in error, the principal on the undertaking. Rule 12 (52 Nebr., xiii) provides, in substance, that a plaintiff in error in each case brought to this court shall give security for costs by filing a bond with one or more sureties, in the sum of \$50, to be approved by the clerk of the district court from which the cause is brought, conditioned for the payment of the costs of this court. The bond in question complies with the provisions of the rule, runs to the defendant in error, and is conditioned that the plaintiff in error shall pay all costs adjudged against him by the supreme court, not exceeding, of course, the penalty named in the bond, viz., \$50. Our authority to enter the judgment prayed for against the sureties or issue an execution on the record as though the obligation for costs was in the nature of a judgment on which an execution may be issued is predicated on two propositions, which are advanced as reasons why the relief asked for may properly be granted. First, it is said that the provisions contained in sections 612 to 616 of the Code of Civil Procedure, and especially the latter section, authorize the rendition of judgment against sureties for costs, and awarding execution thereon. An

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examination of the sections referred to convinces us that they refer alone to actions brought in any county in the state where the plaintiff is a non-resident of the county in which the action is brought, security for costs in such case being required, and which may be given by an indorsement to that effect on the summons, or by signing the name of the surety for costs on the complaint filed in the action. Section 616 authorizes the entry of judgment for costs against the surety on motion and ten days' notice for the amount adjudged against the plaintiff or the unpaid part thereof, and execution may issue as in other cases. The sections referred to, it is obvious, are not applicable to error proceedings brought in this court where a cost bond is, under a rule of court, required to be given as in the case at bar. *Overstreet v. Davis*, 24 Miss., 393; *Martin v. Avery*, 8 Ala., 430.

The second proposition advanced by counsel presenting the motion is that, if the sections referred to are insufficient authority to the court for granting the relief asked, then the court is authorized by virtue of the common law to enforce the payment of the unpaid costs against the sureties on the cost bond by the writ of *scire facias*, or in lieu thereof, under our practice, by the filing of a motion on notice to the opposite party, as has been done in the present instance. Proceedings of this character can only be justified on the theory that there is such a record as conclusively establishes an obligation on the sureties, the satisfaction of which may be enforced by execution, and that the court has acquired jurisdiction over them for the purpose of enforcing the obligation as fixed and determined by such record. It is manifest that as a basis for the issuance of an execution there must be a judgment in fact or a record in the nature of a judgment for the satisfaction of which a general execution may properly be resorted to. Can it be said that the writ of *scire facias*, or in lieu thereof an order on motion and notice under our present practice, similar to the writ, and serving the same office, may be resorted to for the purpose of enforcing the

unpaid costs as against sureties on the cost bond, and without proceeding in an ordinary action to first establish their liability. To support the proposition contended for, we are cited to some very early cases in Maine and Massachusetts, where it was held an indorser of a writ issued at the beginning of a civil action, who had obligated himself for the payment of plaintiff's costs, might be proceeded against for such costs where the plaintiff failed to pay by the writ of *scire facias*. It appears that this requirement for security for costs arose by statute, and this particular remedy was resorted to as a convenient method of enforcing the right given by such statute. The indorser of the writ for the costs assessed in the case against the plaintiff was treated as having incurred a liability analogous to that of those who were sureties on bail given for the payment of a debt to prevent imprisonment where imprisonment for debt was lawful, or to the enforcement of the obligation of sureties on bail or recognizance which has been forfeited in criminal proceedings. Says the supreme court of Maine (*Merrill v. Walker*, 24 Me., 237) : "The proceeding by *scire facias* was an appropriate mode for the purpose, and judiciously adopted. The case of indorsement is analogous to that of bail. The one is to secure the plaintiff in case of the avoidance of the defendant, and the other to secure the defendant in case of the avoidance of the plaintiff. In both cases the cause of action arises from matter of record. In both cases the cause of action is but an incident to a principal cause of action, already determined, the proceedings in which are matters of record. A proceeding, therefore, by a species of judicial writ, to complete the remedy growing out of the original action, is obviously appropriate; and should not be departed from till a statute alteration to the contrary shall have taken effect." See, also, *Reid v. Blaney*, 2 Me., 128; *How v. Codman*, 4 Me., 79; *Miller v. Washburn*, 11 Mass., 411; *McGee v. Barber*, 14 Pick. [Mass.], 212. The writ originally in any of the jurisdictions to which our attention has been called can issue only on a judgment rendered

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in the action, or a record in proceedings of so conclusive a nature as to be tantamount to a judgment, and on which execution would lie for its satisfaction, such as a forfeited recognizance, bail bond, etc. It is issued only against a party to the record, one who is bound by its terms to the same extent as he would be concluded by a judgment to which he was a party litigant. It is founded on some matter of record, as a recognizance or judgment, on which it lies to obtain execution, and is usually deemed a judicial, and not an original, writ. 19 Ency. Pl. & Pr., 262, and authorities cited. It is a warning given to the defendant to appear in court and plead in bar to the execution, or show any cause, if he can, by release, discharge or otherwise, why execution should not issue on the judgment or record against him. 21 Am. & Eng. Ency. Law, 852, and authorities cited. It follows from what has been said that the record on which the writ will lie, must be of such a nature as to conclude the parties against whom it is asked from interposing any defense to its issuance except that which may be pleaded in bar or abatement or in discharge or satisfaction. The record must also be of such a nature as to show the jurisdiction of the court over the person against whom the writ is asked. While it is held in some jurisdictions that matters of record pertaining to forfeited recognizances, bail bonds, and indorsements as security for costs warrant proceedings against those liable on such undertakings by writs of *scire facias*, such has never been the practice in this state. *King v. State*, 18 Nebr., 375. The parties enforcing their rights under such obligations have always been required to pursue their remedy by an ordinary action on the obligation, bring the parties within the jurisdiction of the court and obtain judgment to be enforced in the usual way. Any exception to this rule is only where by express statute other proceedings are authorized. The record on which the writ may issue presupposes the jurisdiction of the court over the person against whom issued, and this can result only where the parties have, by their voluntary action, submitted themselves to

the jurisdiction of the court, and authorized the rendition of the judgment, or the entry of a record equivalent thereto, for the satisfaction of which the writ is resorted to. *Moore v. Kepner*, 7 Nebr., 291; *Lininger v. Raymond*, 9 Nebr., 40. It can not, we think, be said that the sureties on the cost bond in the case at bar are parties to the record in such a sense as to give the court jurisdiction over them and authorize it to issue execution against them for the unpaid costs taxed against the plaintiff and principal in the undertaking. If such were the case, then the court is authorized to proceed summarily against sureties on appeal and error undertakings without the requirement of a civil suit being instituted thereon; but such is not the case according to the statute and practice in this jurisdiction. *Selby v. McQuillan*, 45 Nebr., 512. We are satisfied that on principle the undertaking given in the case at bar, on which we are asked to issue execution against the sureties without other warrant than the mere executing and delivery of the undertaking, must be regarded as of the same general character as other undertakings required to be given during the pendency of litigation, and that the sureties on such undertaking can not be proceeded against summarily in the action in which the undertaking was given but resort must be had to an ordinary proceeding by civil action on the undertaking and in pursuance of the rules governing such actions generally. *Mussina v. Alling*, 12 La. Ann., 799; *Earle v. Cureton*, 13 S. Car., 19; *Overstreet v. Davis, Jr.*, *supra*; *Vanderpool v. Notly*, 42 N. W. Rep. [Mich.], 680.

The motion for judgment against the sureties on the cost bond or the issuance of an execution against them for the amount of the unpaid costs taxed against the plaintiff must, therefore, be denied.

MOTION OVERRULED.

EDNA E. MARTIN ET AL. V. BOND'S ESTATE.

FILED JUNE 4, 1902. No. 11,736.

Title to Realty: ADMINISTRATOR: LICENSE TO SELL: PENDING LITIGATION: ORDER OF DISTRICT COURT. Because litigation is pending involving the title to one of several parcels of real estate for which license is prayed by an administrator to sell for the purpose of paying debts owing by the estate, that fact will not render erroneous an order of the district court, otherwise proper, granting a license to sell such real estate for the purpose mentioned.

ERROR from the district court for Kearney county. Tried below before ADAMS, J. *Affirmed.*

E. C. Dailey, for plaintiffs in error.

M. D. King, *contra.*

HOLCOMB, J.

From an order of the district court granting a license to sell real property for the purpose of paying the debts against the estate of the decedent the plaintiffs in error, as heirs at law and devisees of the decedent, and who objected to the granting of a license, prosecute proceedings in error in this court. It appears that the decedent died possessed of different parcels of lands in Kearney county, which he devised, subject to his debts, to different children, and as to one of such parcels of land litigation resulted as to the state of the title thereof. The administrator with the will annexed made application for a license to sell several tracts belonging to the testator for the purpose of paying debts owing by the estate. The only objection to which our attention is called to the order granting a license is that because of the litigation mentioned with respect to one of the different parcels of land. It is urged that, because of the litigation over the title, the land will not sell for an adequate sum, and therefore the license to sell should be withheld as to all the real estate included in

the application. The whole of the argument of counsel for plaintiff in error to support his assignment of error to the effect that "the court erred in granting license to sell the real estate described in the petition under the pleadings filed," is contained in the following quotation from his brief: "We think the court erred in granting the license on the facts shown by the pleadings, and that the title to the one-quarter section that is now in litigation in the supreme court should be settled before petitioner should be allowed to sell the land, or any of it, for the payment of debts; and there is no good reason why the sale should take place before it has been determined just what real property belongs to said estate." The objection appears to be, in its nature, the interposition of a plea in abatement because of pending litigation affecting the title to some of the lands for authority to sell which a license is prayed. We do not think the plea or objection is good, whether the litigation referred to be with respect to the whole or a part only of the real estate involved in the application for a license to sell the same. There are, perhaps, circumstances which would make it wise and expedient to postpone issuance of a license to sell real estate involved in litigation, and such may be true in the present case, but we can not say from the record before us that error in granting the license affirmatively appears; or that, as a matter of law, the pending litigation involving the title to a part of the real estate to sell which a license is prayed renders erroneous an order of the district court directing the sale of such real estate for the payment of debts due from the estate to which it belongs.

The order complained of is, for the reason stated,

AFFIRMED.

NOTE.—Another Suit Pending.—It is an ancient rule of the common law that *nemo debet bis vexari pro una et eadem causa*—No man ought to be vexed twice for one and the same cause. *Diamond State Iron Co. v. Rorig*, 93 Va., 595, 603.—REPORTER.

FARMERS' STATE BANK V. BENJAMIN BALES.

FILED JUNE 4, 1902. No. 11,949.

1. **Judgment of Justice: FILING TRANSCRIPT: EFFECT.** The filing of the transcript of a judgment of a justice of the peace or county court with, and the docketing of it by, the clerk of the district court, do not make it a judgment of the district court. *Moores v. Peycke*, 44 Nebr., 406.
2. ———: ———: ———: **DORMANT: TIME.** A judgment rendered by a justice of the peace, a transcript of which is duly filed and docketed in the office of the clerk of the district court, becomes dormant where no execution thereon is issued after five years from the date of its rendition, and the filing of a transcript of such judgment in the district court, will not have the effect of keeping it alive for five years from the date of such filing.

ERROR from the district court for Dixon county. Tried below before GRAVES, J. *Affirmed.*

F. A. McMaster, for plaintiff in error.

John V. Pearson, contra.

HOLCOMB, J.

From an order of the district court sustaining a motion to quash an execution and an order of garnishment issued on a judgment claimed to have become dormant, the judgment creditor prosecutes error. But one question is presented for consideration and argued in briefs of counsel, and that is whether a judgment rendered by a justice of the peace, a transcript of which has been filed in the office of the clerk of the district court, and properly entered on the records thereof, and on which no execution has been issued, becomes dormant after five years from the date of its rendition, or will the filing and docketing of the transcript of such judgment serve to keep it alive for five years from the date of such filing and docketing? Plaintiff in error contends for the latter proposition, while the defendant in error maintains the district court was right in hold-

ing to the former as the true rule. The execution quashed by the trial court was issued within five years from the date on which the judgment which had been rendered by a justice of the peace was transcribed and docketed in the office of the clerk of the district court, but more than five years had elapsed from the date of the rendition of the judgment by the justice of the peace. Section 1047 of the Code of Civil Procedure provides that execution for the enforcement of a judgment rendered by a justice of the peace, where it has not been docketed in the district court, may issue on the application of the party entitled thereto, at any time within five years from the date of the entry of the judgment or the date of the last execution issued thereon. By section 482 it is provided that, if execution is not sued out within five years from the date of any judgment rendered in any court of record, or if five years intervene between the date of the last execution issued thereon and the time of suing out another writ, the judgment shall become dormant, and cease to become a lien on the estate of the judgment debtor. Section 561 provides that, as to judgments rendered by a justice of the peace, the parties in whose favor they are rendered may file a transcript thereof in the office of the clerk of the district court, which shall be entered and docketed therein in the manner provided; and in the next section it is said such judgment shall be a lien on the real estate of the judgment debtor from the time mentioned with respect to the time of filing the transcript in the same manner and to the same extent as if the judgment had been rendered in the district court. It is urged by the plaintiff in error that by virtue of the language used in the last section we have referred to, the filing of the transcript, in the district court, of a judgment rendered by a justice of the peace, gives to such judgment, at the time of the filing of the transcript, all of the qualities as if it were a judgment then actually rendered by the district court, that is, to all intents and purposes the filing of a transcript of, and docketing such judgment makes it in effect, a judgment then

rendered in the district court,—and therefore it would not become dormant until five years after the time of filing the transcript, which would be regarded as the date of its rendition in the district court. In our opinion, the different provisions of the Code to which we have referred do not render the section susceptible of the construction contended for. The object of the provisions under consideration with respect to judgments rendered by justices of the peace, is to permit a judgment creditor to secure and enforce a lien on the real property of the judgment debtor as fully and effectively as could be done were the judgment rendered in the district court in the first place. It is a judgment rendered by a justice of the peace, notwithstanding a transcript may be filed thereof in the district court. The time when the judgment was rendered is determined by that fact alone, not by the time of filing a transcript thereof in the district court. The lien on real property attaches by virtue of the filing of a transcript, and the judgment may then be enforced in the same manner as a judgment rendered in the district court. The life of the judgment is the same in either case,—that is, it continues to be alive, and execution may issue, for five years from the date it was rendered; and “rendered” means the time the judgment was in fact given and pronounced. We have, we think, already decided this question in harmony with the views entertained by the trial court. *Moore v. Peycke*, 44 Nebr., 405. In the case cited it is held: “The filing of the transcript of a judgment of a justice of the peace or county court with, and the docketing of it by, the clerk of the district court do not make it a judgment of the district court.” It is said in the opinion, after referring to the section providing for the filing of a transcript in the district court of a judgment rendered by a justice of the peace (p. 412): “It is plain from these provisions that the filing and docketing of such transcript does not transform the original judgment into a judgment of the district court. The statute authorizes such filing simply for the purpose of making the judgment

a lien upon the real estate of the debtor and for being enforced by the issuing of execution out of the district court,"—citing *People v. Doe*, 31 Cal., 220; *Martin v. Mayor*, 11 Abb. Pr. [N. Y.], 295. An authority more directly in point, and under statutes substantially the same as our own, is found in the case of *Brown v. Wuskoff*, 21 N. E. Rep. [Ind.], 243, where it is held that the filing of a transcript of a judgment rendered by a justice of the peace in the circuit court will not extend the life of the judgment. Says the court in the opinion: "The construction we place on the statute is that a judgment rendered before a justice shall be a lien from the time the transcript is filed, recorded, and docketed to the end of ten years from the rendition of the judgment. If we transpose the words of the statute to read 'from the time of filing the transcript the judgment set forth in the transcript shall be a lien upon the real property of the defendant within the county, to the same extent as judgments of the court,' it would hardly be contended, we think, that it could be construed to create a lien for ten years from the filing of the transcript; but when thus transposed, it seems plain that the word 'extent,' as applied to the duration of the lien, should relate to the time of the rendition of the judgment corresponding to the time when the limitation commences to run against judgments of the circuit court, and the words mean the same whether they are transposed or read as written in the statute. Indeed this is the only construction that can be placed on this section of the statute, and give force to the words." In *Wright v. Sweet*, 10 Nebr., 190, it is said (p. 192): "The statute (p. 606) provides that at the expiration of five years from the entry of judgment, if no execution has been issued thereon, or after the lapse of five years from the date of the last execution thereon, the judgment shall become dormant, etc. The lapse of five years raises the presumption of payment, not that the judgment never was entered, nor that it was erroneous or obtained by fraud, or of anything else but payment." See, also, *State v. McArthur*, 5 Kan., 280; and *Lindgren*

v. Gates, 26 Kan., 135. If the filing of the transcript does not have the effect of changing the nature of the judgment, as we have held it has not, and no execution has been issued, then the judgment must be regarded as dormant after the lapse of five years from the date of its rendition; the presumption then arising that it is satisfied. The mere filing of a transcript thereof in the district court can not, we think, have the effect of enlarging the time, or in any wise modifying the rule. After that time, and until revived, it has lost its vital force; it ceases to be a lien on the property of the judgment debtor, and the right to enforce satisfaction by process against his property has terminated. In some jurisdictions to which our attention is called, the filing of a transcript of a judgment of a justice of the peace in the higher court is held equivalent, so far as the time in which the judgment will become dormant is concerned, to the rendition of the judgment in such higher court as of the time of filing the transcript; but such holdings arise by virtue of express provisions of statute dissimilar to ours, and for that reason the authorities cited are not applicable to the question raised in the case now under consideration.

The order of the district court is without error, and is accordingly

AFFIRMED.

NOTE.—*Dormant-Judgment Act*.—*Statute of Limitations*.—Dormant-judgment acts are not mere statutes of limitations, and a judgment will not be saved from dormancy by the mere fact that partial payments are made and receipted for within the limited time. *Stanley v. McWhorter*, 78 Ga., 37; *Lewis v. Smith*, 99 Ga., 603; *Blue v. Collins*, 109 Ga., 341.—REPORTER.

IVER PETERSON V. STATE OF NEBRASKA.

FILED JUNE 4, 1902. No. 12,560.

1. **Keeping Intoxicating Liquor for Purpose of Sale: INFORMATION:** DESCRIPTION OF PLACE OR STRUCTURE: SEARCH WARRANT. An information charging one with keeping and having in his possession intoxicating liquors with the intention and for the purpose of selling the same without having a license or permit therefor, is not fatally defective because it fails to describe the place or structure where the alleged liquors are kept with that degree of certainty and particularity required before a search warrant is authorized to issue under the provisions of section 20, chapter 50, Compiled Statutes, regulating the sale of intoxicating liquors.
2. **Information: WORDS OF STATUTE: DEMURRER.** An information which charges in the language of the statute, or in words equivalent thereto, the commission of an offense as therein denounced, is sufficient, and such information is invulnerable to a demurrer.
3. ———: **KEEPING LIQUOR: LICENSE.** Where an information charges the commission of the offense of keeping in one's possession intoxicating liquors with the intention and for the purpose of selling the same without having a license or permit therefor, alleging therein the time and the town, county, and state in which the offense is charged to have been committed, it is proper to charge the jury that the time and place as alleged in the information must be found from the evidence in order to warrant a conviction, the word "place" having reference to the town and county, and not to the particular building in which such liquors may have been kept.
4. **Prosecution for Unlawfully Keeping Liquor: PRESUMPTIVE EVIDENCE.** In a prosecution under section 20, chapter 50, Compiled Statutes, for keeping intoxicating liquors for sale in violation of law, the possession of such liquors by the accused is presumptive evidence of guilt in the district court, as well as before the examining magistrate, unless the accused "shall satisfactorily account for and explain the possession thereof, and that it was* [they were] not kept for an unlawful purpose." *Durfee v. State*, 53 Nebr., 214.
5. **Instruction.** Instruction requested by the defendant and modified by the court before being given, *held* properly modified.
6. **Evidence.** Evidence examined, and *held* sufficient to support a verdict of guilty as returned by the jury.
7. **Misdemeanor: AT LIBERTY ON BAIL: PRESENCE AT VERDICT: WAIVER.** Where a defendant, charged with a misdemeanor, is at liberty, on bail or otherwise, while his case is being tried,

*This syntactical error occurs in the statute.—W. F. B.

and voluntarily absents himself from the court room at the time the jury returns its verdict, his counsel being present, and no objection being made to such absence defendant will be held to have waived his right to be present at such time, and the reception of such verdict by the court in the absence of the defendant under such circumstances, is without error.

8. **Other Errors.** Other alleged errors examined, and found not well taken.

ERROR from the district court for Kearney county. Tried below before ADAMS, J. *Affirmed.*

J. L. McPhceely, for plaintiff in error.

Frank N. Prout, Attorney General, *Norris Brown* and *M. D. King*, for the state.

HOLCOMB, J.

Plaintiff in error, defendant below, was informed against, and by a jury found guilty of unlawfully keeping and having in his possession intoxicating liquors with the intention and for the purpose of selling and disposing of the same without having a license or permit to sell such liquors, contrary to the provisions of chapter 50 of the Compiled Statutes. A motion for a new trial having been overruled, a sentence imposing a fine of \$100 was duly imposed by the trial court, to secure a reversal of which the defendant prosecutes error proceeding in this court.

The information contains several counts, and a demurrer was interposed to each and every one of them. It is now assigned as error and argued by counsel that the count on which the defendant was found guilty and sentenced to pay a fine was insufficient in its allegations to sustain a conviction, because the facts stated therein do not constitute an offense punishable by the laws of this state, and therefore the court erred in overruling the demurrer. The fault of the count demurred to, it is claimed, lies in the fact that the place where the intoxicating liquors were alleged to have been kept for the purpose of sale was not alleged with sufficient certainty and particularity. It is charged only in the information that the accused, within

the corporated limits of the city of Minden, Kearney county, Nebraska, did then and there unlawfully keep for the purpose of sale, etc., the liquor mentioned. It is contended that the information is defective because not describing the place, building or structure in which it is claimed the intoxicating liquor was kept. Section 20, chapter 50, Compiled Statutes, under the provisions of which the prosecution is had, declares it shall be unlawful for any person to keep for the purpose of sale without license any malt, spiritous or vinous liquors in the state of Nebraska; and any person who shall be found in possession of any intoxicating liquors with the intention of disposing of the same without a license shall be deemed guilty of a misdemeanor, and on conviction shall be fined or imprisoned as provided by section 11. It is then provided that, if any credible freeholder shall make complaint and information in writing and on oath before any proper magistrate that he has reason to believe, and does believe, that liquor is kept contrary to the provisions of the section at any particular place, describing it as nearly as may be, a search warrant shall issue for a search of the premises described for the liquors so alleged to be kept contrary to law; provision also being made for the manner of executing the search warrant. It is also provided in the same section that the possession of such liquors shall be presumptive evidence of violation of said section unless after examination the accused shall satisfactorily account for and explain such possession, and that the liquor was not kept for an unlawful purpose. It will be observed that the information charges every essential fact necessary to constitute the offense as declared in the section referred to, but does not contain necessary allegations warranting the issuance of a search warrant. Doubtless, before a warrant may properly issue authorizing the search of premises for liquor alleged to be kept in violation of the chapter, a complaint must be filed as therein provided for, containing all that is essential to constitute the offense declared by the section, and also describing with such particularity

as the surrounding circumstances will permit the place or building where the liquors are alleged to be kept in violation of law. We observe, however, no good reason for adopting the view contended for to the effect that an information states no offense because it does not contain allegations of fact essential to authorize the issuance of a search warrant. The latter provisions of the section afford only a means for the search for and seizing liquors kept in violation of law, and, when such liquors are found in the possession of one not authorized to sell, that fact, when proved, presumptively establishes the guilt of the person in whose possession found of violating the provisions of the act. There is no valid reason why a person may not be put upon trial for violating the section, and by other competent proof, without resort to the special proceeding authorized by means of the issuance of a search warrant, be found guilty; and, if not required to be proved, then the allegation is not required in order to state an offense of the character therein denounced. The offense is committed by the keeping for the purpose of sale any of the liquors mentioned, and may be proved by any competent evidence. The section, we think, serves a dual purpose, one declaring what the offense shall consist of, and the other providing the means of searching for and seizing liquors kept contrary to the provisions of the act. The right to a search warrant is in no instance authorized until a showing on oath of probable cause and a particular description is given of the place or premises to be searched and the thing to be seized. Constitution, art. 1, sec. 7. We are of the opinion that the information charges all that is essential to the statement of an offense as defined by statute, and, being charged in the language of the statute or its equivalent it must be held invulnerable to a demurrer. *Whitman v. State*, 17 Nebr., 224; *Hodgkins v. State*, 36 Nebr., 160.

An exception is taken to an instruction given the jury wherein both time and place as alleged in the information were spoken of as necessary to be found from the evidence.

The criticism offered to the instruction is that no place was alleged in the information as designating where the liquors were kept. What we have before said applies to this instruction. The place spoken of in the instruction was not the particular building where the liquor may have been kept, but the town, county and state as charged in the information.

An exception is taken to an instruction which is substantially the same as given by the trial court and approved by this court on error in the case of *Durfee v. State*, 53 Nebr., 214, and on the authority of that case, we must hold the exception not well taken. It is contended, however, that while the instruction may be good where there is proof of a search warrant and the finding of liquors in the possession of the accused thereunder, that it is erroneous to so instruct the jury where there is no proof of a search being made and liquor found in the possession of the party complained against. We think this too narrow a construction of the provisions of the statute. It is provided that the possession of intoxicating liquors without a license or permit to sell the same is presumptive evidence of the violation of the act; that is, of keeping liquors with the intention and for the purpose of sale without having a license or druggist's permit authorizing the making of such sales. It can hardly be contended that a prosecution would fail simply because no liquors were found under a search warrant if issued. The unlawful possession may be proved by other competent evidence, and when the fact of possession is established either by means of the search warrant or otherwise, then the presumption arises that it is kept for the purpose of sale, unless such possession is satisfactorily explained and accounted for. The evidence in the case at bar is ample to show that the accused was in possession of intoxicating liquors as charged in the count on which he was found guilty, and at the time alleged in the information. In fact, as we understand the record, he, by his own evidence, admits being in possession of intoxicating liquors of the kind charged, and defends on

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the ground that he was the agent or servant of a social club or organization which owned the liquors, and dispensed them only to its own members. The instruction was proper, regardless of the question of whether the liquors were found in the possession of the accused under a search warrant issued in pursuance of the provisions of the latter part of section 20. If the jury might find from any proper evidence before them that the liquors mentioned were in the accused's possession, and that he had no authority to sell and dispose of the same, then the instruction became pertinent to the case as made by the evidence.

Another instruction given at the request of the defendant and modified by the court, is excepted to because of the modification. The modification was with reference to the presumption arising from the fact of possession of intoxicating liquors without having a license to sell, unaccounted for and unexplained, was consistent with the other instructions on the same point and was, we think, properly made.

The question of sufficiency of the evidence to sustain the verdict is presented, but we have already stated that we regard the evidence as sufficient to support a finding of guilty on the one count of the information which we have been discussing. The evidence of possession for the purpose of sale without a license is by defendant's own testimony placed beyond the pale of controversy.

A motion for a new trial was asked on the ground that the verdict of guilty was returned by the jury, received by the court, and the jury discharged in the absence of the defendant, who appears to have voluntarily absented himself from the court room at the time the jury returned their verdict. The motion for a new trial on the ground just spoken of, is supported by the affidavits of the defendant and his counsel, which disclose, in substance, that, while his attorney was present in court when the verdict of the jury was received, the defendant was away from the court room, attending to his affairs or on the street, and did not learn of the verdict until informed by one of the

discharged jurymen. The acceptance of the verdict and the discharge of the jury under the circumstances is assigned as error. The defendant, we think, must be held to have waived his personal presence at the time the verdict was returned. The case was one charging only a misdemeanor. The accused was present during the trial, and was evidently enjoying his liberty on bail. His right to be present was one which he might waive, and when he voluntarily absented himself, and no question was raised at the time, this fact must, we think, be taken as a waiver of his right to be present. His counsel was present, and, so far as the record discloses, no mention was made of the defendant's absence, and no objection offered because he was not personally present, and no request for a postponement of further proceedings until his personal presence could be secured. No prejudice as to any substantial right appears to have resulted, and surely, under such circumstances, he can not complain of his own deliberate action, and stop the trial of the cause until by some process he is again brought into the presence of the court. He could lawfully waive his right to be present at any stage of the proceedings in the prosecution against him, or, for that matter, during the entire trial; and it is clear that he did waive his right to be present when the verdict was returned. His absence may be attributed only to his own fault or negligence, if any there be. *Fight v. State*, 7 Ohio, 181; *Sahlinger v. People*, 102 Ill., 241; *Sturgeon v. Gray*, 96 Ind., 166; *State v. Kelly*, 97 N. Car., 404, 409; *Lynch v. Commonwealth*, 88 Pa. St., 189; *Robson v. State*, 83 Ga., 166, 171.

An examination of the entire record and consideration of all errors assigned and argued as grounds for reversal of the judgment, leads to the conclusion that the defendant has not been deprived of any substantial right in the prosecution of the information filed against him, and that the judgment should remain undisturbed.

The judgment is, accordingly,

AFFIRMED.

NOTE.—*Keeping for the Purpose of Unlawful Sale.—Common Law.—Statute.*—The keeping of liquor for the purpose of unlawful sale, is a statutory offense *sine cera*. Such an offense was unknown to the common law. Bishop, Statutory Crimes [3d ed.], 1054. The gist of the offense is the guilty intent, which does not of necessity include knowledge of the intoxicating quality of the liquor. *Commonwealth v. Goodman*, 97 Mass., 117. One who is authorized to sell liquor in a lawful manner—*e. g.*, licensed town-agent—may be guilty of this offense, if he has the intent to dispose of the liquors unlawfully. *State v. Connelly*, 63 Me., 212. If the statute omit the words “within the state,” the law is violated by keeping the liquor with the intent to dispose of it unlawfully in another state.* *State v. Guinness*, 16 R. I., 401. The intent need not be to sell or dispose of the liquor from the building in which it was kept. *State v. Viers*, 82 Ia., 397. If the offender is punished for an unlawful sale, the previous unlawful keeping for the purpose of such sale is *not* merged in the sale; he can still be punished for it as a distinct offense. *Menken v. Atlanta*, 78 Ga., 668. For the same reason, a trial and conviction or acquittal can not be pleaded, *autrefois convict* or *autrefois acquit*, for the one offense against the other. *State v. Head*, 3 R. I., 135. The indictment is sufficient if it follows the statute substantially. *Commonwealth v. Gilland*, 9 Gray [Mass.], 3.

Evidence.—Possession and intent are the two essential facts to be proved. No actual sale is necessary to complete the offense. A case may be made out without proof of sale or of offer to sell. *State v. McGlynn*, 34 N. H., 422. The evidence of a sale is, however, admissible; and the intent may be presumed from the unlawful sale. *State v. Sartori*, 55 Ia., 340; *Commonwealth v. Fitzgerald*, 14 Gray [Mass.], 14. The evidence of sale, admitted on a trial for the selling, is admissible on a subsequent trial for the unlawful keeping. *State v. Head*, 3 R. I., 135. The unexplained possession of liquors under suspicious circumstances, is sufficient to sustain a verdict of guilty. *Commonwealth v. Gallagher*, 124 Mass., 29; *Commonwealth v. Levy*, 126 Mass., 240. Such evidence is competent. *Commonwealth v. Tenney*, 148 Mass., 452; *Commonwealth v. Purtle*, 11 Gray [Mass.], 78. Upon the question of intent, the fact that the defendant kept a saloon shortly before and shortly after the act complained of is admissible. *Commonwealth v. Matthews*, 129 Mass., 487. Where a person has a lawful permit to sell liquor for a certain purpose—*e. g.*, a druggist—the jury may take into account the amount of liquor he has on hand. *State v. Shank*, 74 Ia., 649. Evidence tending to show that the defendant kept ale for sale in his house at a certain time, is competent as to whether spirituous liquors kept there at the same time were kept for sale. *State v. Gorman*, 58 N. H., 77. The condition of the place where the liquor is alleged to be kept, as to appointments and fixtures, is competent evidence. *Commonwealth v. Powers*, 123 Mass., 244. Also

*Read section 20, chapter 50, Compiled Statutes. Can a man be punished under that section for keeping liquor for unlawful sale in another state?—REPORTER.

Peterson v. State.

evidence that the defendant's place was one of common resort; that intoxicated persons were seen to come from there; that, at the time of the search, there were signs of recent drinking; and that defendant, a short time before—within a month—was laying in a stock of liquors. *Commonwealth v. Mead*, 140 Mass., 300; *Commonwealth v. Leighton*, 140 Mass., 305. The defendant can not be convicted upon common rumor or reputation. *Cobleigh v. McBride*, 45 Ia., 116. Now, in *State v. Burrill*, 29 Wis., 435; *State v. McDowell*, Dudley, Law [S. C.], 346; *Territory v. Chartrand*, 1 Dak., 379, and in *Drake v. State*, 14 Nebr., 535, it is held that, in the trial upon an indictment for keeping a house of prostitution, the reputation of the place could be shown. Some of the decisions, *supra*, hold the proof of the reputation sufficient to convict. *Quære*: Why one rule in regard to a tippling shop and another in regard to a bawdy house?

Proof of One Offense in the Trial for Another.—It will be seen, by authorities cited in this note, that it is competent to prove the sale of liquor in the trial of an indictment for keeping liquor with the intent to sell. It is a familiar rule that it is frequently competent to introduce evidence of one offense in the trial for another, in order to show, (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related that the proof of one tends to prove the other, (5) the identity of the person charged with the commission of the crime on trial, (6) guilty knowledge. A learned discussion of this subject may be found in both the argument of counsel and the opinion of the court in *People v. Molineux*, 168 N. Y., 264, in the 2d, 3d, 4th, 5th, 6th and 7th paragraphs of the syllabus—pp. 267 and 270, for argument of counsel, pages 293 *et seq.*, for opinion of court.

Quære.—The crime of being an accessory before the fact to the crime of murder in the first degree merges in the fact of becoming a principal. *Buzzell v. State*, 59 N. H., 65, 68. Why does not the crime of keeping liquor for unlawful sale merge in the subsequent crime of making the sale? Is there a difference of principle between the two cases?—REPORTER.



APPENDIX.

APPENDIX A.

IN RE WILLIAM RHEA.

Coram SULLIVAN, C. J., at chambers.

The case of *Rhea v. State* will be found in 63 Nebraska, pp. 461-496. Governor Savage gave Rhea a reprieve and fixed the date of the execution of the sentence July 10, 1903, on conditions accepted by Rhea that in the interim he should be confined at hard labor in the penitentiary during the hours of labor, and in solitary confinement during the hours that the other prisoners were confined in their cells. It may be stated here, for what it is worth as a precedent for future practice, that the reprieve, acceptance and proof were recorded by the clerk of the supreme court, and not by the clerk of the district court of Dodge county. Criminal Code, sec. 558.

On the morning of July 10, the counsel for Rhea, Messrs. George L. Loomis, of Fremont, George A. Adams and Thomas J. Doyle, of Lincoln, and Francis G. Hamer, of Kearney, applied to Chief Justice Sullivan, sitting at chambers at the court room in the city of Lincoln, for a writ of injunction against warden Allen D. Beemer to enjoin him from carrying into effect the order of the governor in his warrant of reprieve on the ground that the fixing the date of an execution was a judicial act and could not be performed by the governor. The injunction was ancillary to an application for a writ of error *coram nobis*, asking the court to review its own alleged error in the construing of section 3 of the Criminal Code. After alleging that the governor had refused to further interfere the petitioner alleges, *inter alia*:

"That the opinion and judgment of this court herein

rendered and pronounced against your petitioner was and is based on a misunderstanding of fact which your petitioner now alleges he can show to the satisfaction of the court, in this, to wit: That the construction of said section 3 of the Criminal Code of the state of Nebraska was in said opinion based largely upon the fact that in the amendatory act of 1893 the comma immediately following the word 'purposely' is omitted, and in that respect, and because thereof, said section was held to be different from the Ohio section at the time of its construction by the supreme court of that state as aforesaid, and that this constituted an amendment of the section after it was so construed by the supreme court of Ohio and was sufficient to justify an inference that the legislature intended to change the meaning and construction of said section so that this court would be no longer bound by the Ohio construction thereof, but at liberty to refuse to follow the same, when in truth and in fact there was no comma immediately following the word 'purposely' in the Ohio statute as enacted by the legislature of that state, and as it was when so construed by the supreme court of that state, all of which plainly appears by the official publication of said section in the Session Laws of Ohio for the year 1834-1835, in which the same was first officially published after its passage, and said comma was first placed in said section by a compiler of the statutes of Ohio some years later."

Chief Justice SULLIVAN called to his assistance AMES and POUND, CC., who sat with him.

In argument *Doyle* said the chief justice could make use of injunction, habeas corpus or any high prerogative writ adequate to the purpose of staying the execution until the full bench could make an examination of the questions involved.

Hamer argued that the solitary confinement and hard labor was an aggravation of the punishment, *ultra vires* of the governor.

Loomis argued that the court had not lost jurisdiction, and cited *Parrish v. State*, 18 Nebr., 405.

Adams pressed upon the chief justice the importance of the writ of error *coram nobis*, claiming that the writ must exist under our practice, and citing the Indiana practice.

Prout, attorney general, as to the power of the governor to fix a new date for the execution of the sentence, cited *Sterling v. Drake*, 29 Ohio St., 457.

The chief justice, after consultation, said that they were all of opinion that the petitioner was invoking a power which did not exist in the full bench, and, *a fortiori*, in a judge at chambers; and that the governor acted in accordance with the constitution.

Application denied.

NOTE.—William Rhea was executed at the state penitentiary at 1:22 p. m., July 10, 1903.

Fixing date of execution is a ministerial act, and a statute giving such power to the governor of the state is not in violation of the constitutional guaranty that a man shall not be deprived of his life, liberty or property without due process of law. *Commonwealth v. Costley*, 118 Mass., 1; *Holden v. Minnesota*, 137 U. S., 483; *Schwab v. Berggren*, 143 U. S., 442.

The order designating the day of execution, is strictly no part of the judgment, unless the statute makes it so. *Holden v. Minnesota*, 137 U. S., 483, 495; *Ex parte Howard*, 17 N. H., 545; *Cathcart v. Commonwealth*, 37 Pa. St., 108.

The fixing of the date of the execution of a death sentence was by the common law of England lodged in the discretion of the sheriff. *Commonwealth v. Costley*, 118 Mass., 1, 35; *Re v. Rogers*, 3 Burrows [Eng.], 1809, 1812; *Atkinson v. The King*, 3 Brown, C. P. [Eng.], 517.

No power exists in any court of equity to interfere by injunction with the prosecution and punishment of crimes and offenses in the courts of common law. *Suess v. Noble*, 31 Fed. Rep., 855; *Kerr v. Corporation of Preston*, 6 Ch. Div. [Eng.], 463; *Saull v. Browne*, 10 Ch. App. [Eng.], 64; *Moses v. Mayor*, 52 Ala., 198; *Joseph v. Burk*, 46 Ind., 59; *Gault v. Wallis*, 53 Ga., 675.

Under our practice, injunction will lie, as an ancillary proceeding, where the court has jurisdiction of the principal action. *Territory v. Armstrong*, 50 N. W. Rep. [Dakota], 832; *State v. Cunningham*, 51 N. W. Rep. [Wis.], 724; *Giddings v. Blacker*, 93 Mich., 1; *Re Sloan*, 25 Pac. Rep. [New Mex.], 930, 936-7.

A writ of error *coram nobis* is directed to the same court which tried the cause to correct an error in fact. Bouvier, Law Dictionary, article *Coram Nobis*, and authorities there cited.

A writ of error *coram nobis* is designed to review proceedings before the same court which is alleged to have committed the error. An-

derson, Law Dictionary. [The expression *coram nobis*—before us—was the royal use of the first personal pronoun plural, before us, the sovereign, *i. e.*, the king's bench.—EDITOR.]

After a term of court has expired, no discretion or authority remains with the court to set aside a judgment. A court may amend the judgment in a matter of form, upon due notice to the opposite party. *Cook v. Wood*, 24 Ill., 295.

The writ of error *coram nobis* has never been in use in the state of Illinois, and has fallen into desuetude even in England. Its place is supplied by motion in the court where and during the term when the error occurs. *McKindley v. Buck*, 43 Ill., 488.

The fact that the governor can pardon, does not deprive the court of power to grant relief in a proper case. The rules of common law not inconsistent with our constitution or statutes, and not opposed to our system of government, may be resorted to when necessary to vindicate a clear right. The right to maintain a proceeding in the nature of a writ *coram nobis*, has not been abrogated by our statute. *Sanders v. State*, 85 Ind., 318, 44 Am. Rep., 29. See, also, Swift's Digest, vol. 1. p. 790; *Jeffrey v. Fitch*, 46 Conn., 601, 604; *Dewitt v. Post*, 11 Johns. [N. Y.], 460; *Comstock v. Van Schoonhoven*, 3 How. Pr. [N. Y.], 258, 259; *Day v. Hamburgh*, 1 Browne [Pa.], 75; *Phillips v. Russell*. Hempst. [U. S. C. C.], 62.

In Tennessee the writ lies to decrees in chancery, as well as to judgments at law. *Hicks v. Haywood*, 4 Heisk. [Tenn.], 598; *Swofford v. Howard*, 8 Baxter [Tenn.], 326. The latter is an *obiter-dictum*.

Although there is no reference in the Revised Code to a writ of error *coram nobis*, it is nevertheless a common-law remedy, and may be adopted in a proper case. The same object may, however, be effected by motion, which is the usual practice in the appellate court. *James v. Williams*, 44 Miss., 47.

Reprieve and Pardon—Power of Court and of Chief Executive Magistrate.—The judge who presides has no power in vacation to grant a reprieve. *Ex parte Howard*, 17 N. H., 545, 547.

A power to reprieve is not necessarily included in the power to pardon. Courts can not pardon. But it appears that a court may stay an execution, and might reprieve at common law. *Ex parte Howard*, 17 N. H., 545, 547.

The chief executive magistrate may reprieve, even where there is no express provision authorizing a reprieve in the constitution or statute. *Ex parte Howard*, 17 N. H., 545, 546.

If a reprieve were held to be an unwarranted exercise of power by the governor because not within the limits of his power, the prisoner could not be discharged. If it were entirely without authority, the only effect would be to require a new order of the execution of the sentence. *Ex parte Howard*, 17 N. H., 545, 548.

Ex parte Howard, hereinbefore repeatedly cited, was a case where the defendant had been indicted for and convicted of murder in the first degree, and sentenced to death by hanging on Wednesday, November 12, 1845. On the 8th day of November the governor issued an order to the sheriff respiting or reprieving the prisoner from the execution of the sentence "until Wednesday, the 8th day of July,

1846, or until the pleasure of the legislature be made known." On December 16 a writ of habeas corpus was issued by the supreme court, on the application of Howard, to which the sheriff made return exhibiting the mittimus of the justice, the judgment of the common pleas and the reprieve of the governor, whereupon Howard's counsel moved for his discharge. The prisoner was remanded.

At common law the justices of the assizes could grant arbitrary reprieves of their own sentences, after the termination of their sessions. But this power stood on ancient usage, rather than express authority. 2 Hale, 412; Chitty, Criminal Law, 758, 759. [This power of the judiciary to reprieve persons under sentence of death was derived from the royal prerogative; the justices acted in the king's name.—EDITOR.]

Some American courts have held that any court which has power to award execution may grant reprieve of its own sentence as a matter of common right. *Weaver v. People*, 33 Mich., 296; *People v. Kelly*, 53 Mich., 260; *Falls v. State*, 2 Sneed [Tenn.], 232, 235; *Allen v. State*, Mart. & Yerg. [Tenn.], 294. These decisions appear to be based on English cases.

As to the power of judges in vacation, see *Miller's Case* (correspondence between Governor Clinton and Judge Edwards), 9 Cow. [N. Y.], 730.

A mere respite with no condition attached, need not be accepted by the prisoner. *Sterling v. Drake*, 29 Ohio State, 457.—W. F. B.

The following dissenting opinion on motion for rehearing of main case, 63 Nebr., 461, was filed April 2, 1902:

RHEA V. STATE.

SEDGWICK, J., dissenting.

The trial court instructed the jury that the unintentional and accidental killing of a human being is murder in the first degree if at the time of the killing the defendant was engaged in attempting to perpetrate a robbery upon the person of the deceased.* This was the rule of

*The instruction was as follows:

"If you believe from the evidence beyond a reasonable doubt, that at the time of the alleged killing the defendant had entered the saloon of the said Herman Zahn for the purpose of feloniously and violently taking the money or personal property of said Herman Zahn from his person by force, intimidation or by putting said deceased, Herman Zahn, in fear and that in the prosecution of that purpose, the defendant shot the deceased and thereby caused his death, then such killing under such circumstances would be murder in the first degree. In other words, if from the evidence the jury believe beyond a reasonable doubt that the defendant killed said Herman Zahn, and also at the time of the killing that the defendant was engaged in an attempt to perpetrate a robbery upon the person

the common law. And many of the states have adopted it by statute. Many of the severe rules of the common law have been modified by our statutes upon the theory that crimes are not prevented by too severe penalties. Some of the states have refused to legalize the taking of human life as a punishment for crime. The tendency has been, and is, toward the adoption of more humane rather than more severe penalties. We have no common-law crimes in our state. No man can be punished for crime except in pursuance of a plain statute defining the crime and providing for the punishment.

The language of the statute construed by the instruction referred to is: "If any person shall purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate any rape, arson, robbery or burglary, or by administering poison, or causing the same to be done, kill another, * * * every person so offending shall be deemed guilty of murder in the first degree," and the instruction is predicated upon the construction of this statute in *Morgan v. State*, 51 Nebr., 672.

My mind refuses to so construe the statute. The words "in the perpetration or attempt to perpetrate any rape, arson, robbery or burglary" have the same relation to the

of the said deceased, then the defendant would be guilty of murder in the first degree."

It is worthy of note that this instruction in the *Rhea Case*, upon which the principal contention was made (see 63 Nebr., 476), was given in two cases of felonious homicide in the same county (*Shepherd v. State*, 31 Nebr., 389, and *Furst v. State*, 31 Nebr., 403), and no exception was taken at *nisi prius*, and, as a matter of course, no such point was made on review. The instruction is, in each record, numbered 25.

Adopting a Statute or Constitutional Provision Which Has Received a Judicial Interpretation.—At the time of the adoption of the Thirteenth Amendment abolishing slavery, the question was before the U. S. Senate. Charles Sumner wished to follow the language of the French Constitution of 1791,—which was borrowed from the Roman lawyers,—“Equal before the Law.” The Judiciary Committee reported the language of the Northwestern Ordinance. Howard of Michigan spoke for the report of the committee, because the language had received judicial interpretation; and, for that reason, the language of the Northwestern Ordinance was adopted. *Congressional Record*, 38th Congress, Part 2, pp. 1482-1489.—W. F. R.

word "purposely," and to all other parts of the section, that the words "by administering poison or causing the same to be done" have.

My attention has been called to the decisions of three states besides our own which have a statute like ours. We seem to have borrowed our statute from Ohio, and they have the same statute in Oregon and Indiana.

In the case of *Bechtelheimer v. State*, 54 Ind., 128, 136, it was held that a purpose to kill was necessary to constitute murder where the killing was effected by the administration of poison. The court said: "If no purpose to kill is necessary to constitute murder, where the killing is brought about by administering poison, then the most innocent act of one's life may turn out to be a murder, and that too in the first degree, subjecting him to the gallows or imprisonment for life. If a purpose to kill is not necessary, then the man is a murderer, who innocently administers what he supposes to be a proper dose of medicine, but which turns out to be a poison which kills the party taking it."

In *Moynihhan v. State*, 70 Ind., 126, 130, the above language is quoted and the court further said: "By the innocent administration of poison no penal law is violated, no moral turpitude is shown. To hang a man for such a mistake, or incarcerate him for life, is a barbarity not inflicted by the law of any civilized and enlightened people."

But in the latter case the statute is construed to mean that if the killing is done in attempting to commit robbery it is not necessary to show any intention to kill. To my mind these cases seem inconsistent with each other, and they certainly are so, unless the legislature is without power to make the killing of a human being by administering poison constitute murder when not done with the purpose of killing. That the statute makes the same provision in precisely the same words in regard to killing while attempting to perpetrate a robbery can not be questioned, so that if no purpose to kill is necessary in one case to constitute the crime of murder it certainly can not be in the other, unless it is not competent for the legislature to

so provide in the one case, but is competent in the other. But if the legislature could not make the killing by poison, without the purpose to kill, murder, why charge it with an attempt to do so when the statute is susceptible of another meaning? Not long ago by English law a man was hanged for murder if he, being engaged in any unlawful act, accidentally killed a human being. The legislature has abandoned that rule, and it is not unreasonable to suppose that it was the intention of the legislature that no one should be hanged for murder unless he did the killing purposely as it is to suppose that it was intended that one who caused death by honest mistake in the giving of a supposed medicine should be guilty of murder. If this statute does not make the accidental killing of a person by administering poison murder in the first degree, then, by the same construction, a homicide committed in the perpetration of robbery is not murder in the first degree unless the killing was purposely done.

Our statute was borrowed from Ohio and had been construed by the courts of that state several times before its adoption here.

In *Morgan v. State*, 51 Nebr., 672, 693, it is said: "There exists, notwithstanding the many adjudications in point, some diversity of opinion respecting the effect of constructions placed upon statutes previous to their adoption in other jurisdictions. Such a construction, it is sometimes said, becomes, upon the enactment of the statute by another state, an integral part of the act itself, having the force and effect of a legislative command. However, the more rational view, and the one sanctioned by authority, is that, except as applied to English statutes in force in this country at the time of the war of the revolution, the effect of such previous constructions is the same as of decisions by courts of last resort having jurisdiction of the particular controversy. *Cathcart v. Robinson*, 5 Pet. [U. S.], 264. The Ohio case must, therefore, be regarded as a construction of the statute, to be ignored or rejected only for reasons which would require the overruling thereof had the decision been pronounced by this court, and in that light it will now be examined."

In *Cathcart v. Robinson*, which is cited as authority for this doctrine, it is said: "The rule, which has been uniformly observed by this court in construing statutes, is to adopt the construction made by the courts of the country by whose legislature the statute was enacted; this rule may be susceptible of some modification, when applied to British statutes which are adopted in many of these states; by adopting them they become our own, as entirely as if they had been enacted by the legislature of the state. The received construction in England, at the time they are admitted to operate in this country, indeed, to the time of our separation from the British empire, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But however we may respect subsequent decisions, and, certainly, they are entitled to great respect, we do not admit their absolute authority. If the English courts vary their construction of a statute which is common to the two countries, we do not hold ourselves bound to fluctuate with them." 5 Pet. [U. S.], *264, *280.

It does not seem to be authority for the proposition upon which it was cited. Its holding would seem to be against it. It seems to me that the language used is not ambiguous, and that it will not admit of the construction given it in *Morgan v. State*.

There seems to be no uncertainty as to the construction given this statute by the Ohio court prior to its adoption in this state. It is said in *Morgan v. State*: "That case [*Robbins v. State*] was decided by a bare majority of the judges. Swan and Brinkerhoff joining in a vigorous dissenting opinion, and the doctrine there announced has not been so far as we can discover subsequently asserted by that court." Judge Swan wrote a dissenting opinion embracing a few lines in which he says that he has not seen the opinion of the court, and in which he does not refer to the statute or its proper construction.

It is also said that Judge Brinkerhoff dissented on substantially the same grounds as Judge Swan. These judges united in a dissenting opinion in the case of *Fouts v. State*,

decided by that court at the same term, in which the rule of law was stated by the court to be: "Intent or purpose to kill, although not essential to constitute murder at common law, is made one of the ingredients of the crime of murder by the statute of Ohio." 8 Ohio St., 98. And in their dissenting opinion, referring to a Pennsylvania case which had been cited in the majority opinion of the court, they said: "We can not perceive the application of this case to the one before us. If it be cited to show that a common-law indictment for murder is not good in this state; or that there must be a purpose to kill averred in indictments for murder under our statute, it was hardly necessary to cite it, as no one we believe ever disputed it." 8 Ohio St., 98, 125.

This court in the *Morgan Case* was also misled in supposing that the Ohio court has not subsequently asserted the same doctrine. In *Jones v. State*, decided by that court in 1894, it is said in the syllabus: "An intention to kill is an essential element of the crime of murder in this state, and must be established beyond a reasonable doubt, to authorize a verdict of murder in the first or second degree." And in the opinion: "The statutes of Ohio make an intention to kill an essential ingredient of the crime of murder, in either degree, except in case of death following from maliciously placing obstructions on a railroad track, etc. Revised Statutes, secs. 6808, 6809, 6810. The intent or purpose to kill, being an essential constituent of the offense, should be averred and proven. *Fouts v. State*; 8 Ohio St., 98; *Kain v. State*, Id., 306; *Hagan v. State*, 10 Ohio St., 459."

This construction of the statute seems to have been well established by various decisions many years prior to the adoption of the statute in this state and has since been uniformly adhered to.

The doctrine that when the legislature adopts a statute of another state it likewise adopts the judicial construction which it had already received by the highest court in said state, or in the language in *Cathcart v. Robinson*, 5 Pet. [U. S.], 264: "By adopting them they become our

own as entirely as if they had been enacted by the legislature of the state," is the thoroughly established rule in this state. *Coffield v. State*, 44 Nebr., 417, 423; *Forrester v. Kearney Nat. Bank*, 49 Nebr., 655, 663.

Judge MAXWELL, in his Criminal Procedure, page 200, says: "The intent or purpose to kill must in all cases be averred in the indictment and be proved on the trial, otherwise there can be no conviction of murder in the first degree, even in cases where the accusation is the attempt to perpetrate a rape, arson, robbery or burglary, or in the administering of poison."

This seems to me to be the proper construction of the statute.

APPENDIX B.

The editor has received, from members of the profession, so many requests for copies of the following opinion that the original edition has been nearly exhausted. The opinion is accordingly hereto appended, at the special instance and request of the present insurance commissioner:

IN RE STATE LIFE INSURANCE COMPANY OF INDIANAPOLIS,
INDIANA.

On the 21st day of July, 1899, a complaint was filed with the bureau of insurance in the executive department of the state of Nebraska, which, with amendments subsequently made, is in words and figures following:

"OMAHA, NEBR., July 21, 1899.

"Hon. Wilbur F. Bryant, Deputy Insurance Commissioner,
Lincoln, Nebraska:

"DEAR SIR: We, the undersigned, citizens of Nebraska, engaged in the life insurance business, respectfully represent that the State Life Insurance Company of Indianapolis, Indiana, are selling special contracts in this state called the 'Local Representative Contract' agreeing to give special advantages to holders of such contracts. They claim to sell but a limited number of these in each state. They have recently sold these special contracts to the following parties:

"C. W. Conkling and two sons, R. J. Mitten, all of Tekamah, Nebraska; M. F. Kennedy, John R. Kennedy and Horace McCoun, of Craig, Nebraska; J. E. Blenkiron and B. Predmestky, of Bancroft, Nebraska, for \$5,000 each.

"We claim these special contracts violate the mutuality of the company, giving special advantages to the few at the expense of the many, and are therefore void. We submit a letter from the insurance commissioner of Tennessee, wherein he states that he revoked the license of said company for issuing these special contracts; also letters from the commissioners of Ohio and Michigan, wherein they state that they compelled this company to stop issuing these special contracts; also copy of a letter from the commissioner of Kansas, stating that he refused a license to this company until they agreed to stop issuing their special contracts; also a letter from Auditor Hart, of Indiana, wherein he holds that such a contract is illegal. These contracts, as you will see upon investigation, can never be carried out.

"The undersigned also represent that as to the said M. F. Kennedy, and, as they are informed and believe, as to all other persons to whom said special contracts are issued by said company, they are issued only upon this condition that the person receiving the same shall at the same time purchase a policy of insurance upon his own life from the company and that the money consideration which the insured pays for his policy of insurance is the only substantial or valuable consideration which he pays or promises for being appointed a local representative by said special contract.

"For these reasons we respectfully request that the license of the State Life Insurance Company of Indiana to do business in this state be revoked.

"We are willing to appear before you and substantiate the above facts, if requested to do so. Respectfully submitted,

"CHAS. E. ADY, General Agent National Life Ins. Co.

"W. J. FISHER, General Agent New England.

"A. R. EDMISTON, General Agent Union Central Life.

"C. Z. GOULD, General Agent Penn Mutual.

"FLEMING BROS., Mgrs. Mutual Life.

"A. L. WIGTON, Royal, Royal Union.

"CHAS. W. RAINEY, State Agent Mutual Benefit.

"J. M. EDMISTON, State Agent Union Central Life.

- "WILLIAM HENRY BROWN, Cashier Equitable Life.
- "JOHN SYLVAN BROWN, Gen. Agt. Conn. Mutual Life.
- "J. W. CRAIG, General Agent State Mutual Life.
- "JOHN STEEL, Gen. Agent Northwestern Mutual Life.
- "R. F. ALEXANDER, Cashier N. Y. Life Ins. Co.
- "M. F. ROHRER, Gen. Agent Provident Savings Life.
- "A. LANSING, Gen. Agent Provident Life & Trust.
- "H. R. GOULD, Gen. Agent Phoenix Mutual Life."

Notice was given to all parties immediately concerned, and the day of hearing was fixed for the 14th day of August, instant, at two of the clock in the afternoon. After a hearing of three days argument, four lawyers and an equal number of laymen participating, the cause was submitted to the department, his excellency, the governor, sitting with the deputy commissioner.

John H. Ames appeared on behalf of the plaintiffs, and Charles F. Coffin of Indianapolis and Roscoe Pound, esquire, *contra*.

It appears, at first sight to be unfortunate that this department can neither administer oaths, or subpoena witnesses and compel their attendance. It is wise that these provisions were not made, and that the powers of the department are as circumscribed as its jurisdiction. Otherwise unnecessary expenses might be entailed, to be defrayed by the parties or by the state.

When the hearing in this case was first ordered, the department informed parties that in its opinion the rule of reasonable doubt, which prevails in criminal prosecutions, would govern the evidences in a matter of this kind. But in considering the matter, it will not be necessary, in our judgment, to invoke that rule.

The opinion at which we have arrived, can, in our judgment, be reached by the rules of civil evidence.

In considering this question, little attention will be paid to the complaint filed herein. It is not a pleading, and this department is not a court. The only office of the complaint is to call the attention of this department to the alleged irregularities. Being once advised in this matter, it was the duty of the department to ferret out the

matter, even had no accusers appeared to substantiate the complaint.

It was shown at the hearing that, upon the application following:

"APPLICATION FOR APPOINTMENT AS LOCAL REPRESENTATIVE OF THE STATE LIFE INSURANCE COMPANY, INDIANAPOLIS, INDIANA.

"I, John Doe of Doeville hereby apply to the State Life Insurance Company for appointment as one of its Local Representatives, and I hereby stipulate and agree that if I am appointed, I will aid in promoting and maintaining the Company's business through its authorized agents, by recommending to them suitable persons whom they may secure for insurance; and that, during the continuance of my contract of appointment, I will, by my effort so directed, maintain upon the books of the Company at least \$5,000.00 of insurance, but it is understood and agreed that I shall not solicit insurance, nor forward applications for insurance to said Company, nor in any manner aid in the transacting of its business.

"I further agree upon written request to advise the Company as to the fitness and desirability of agents and applicants for agencies, to furnish confidentially such information as I may possess regarding the personal habits of applicants for insurance, and those of lapsed policy holders who apply for reinstatement and such information as may come to my knowledge regarding claims against the Company which might assist in protecting the Company from fraudulent and false claims.

"This application is based upon the condition that I shall receive such compensation as others who may be appointed to similar positions, which compensation shall be duly set forth in my contract of appointment. I hereby agree that such contract shall terminate, and all compensation thereunder cease, should I fail or refuse to carry out the provisions of this agreement.

"This agreement is entered into with the full knowledge of the contents of said contract of appointment, a sample of which I have examined, and with the express understanding that I shall not be required to take a policy of insurance in said Company as a condition for securing the appointment herein applied for.

"Dated and signed, this twentieth day of July, A. D. 1899, at Lincoln Nebraska.

"JOHN DOE, *Applicant*.

"Witness: RICHARD ROE,"

the company named in the caption, had issued the following contract:

"Local Representative Contract.

The State Life Insurance Company,
Indianapolis, Indiana.
Limited to 500.

"In consideration of the stipulations and agreements made in my application as a Local Representative of the State Life Insurance Company, which application is made a part hereof, the State Life Insurance Company hereby appoints John Doe a Local Representative of said company and hereby agrees to the following articles in relation to such appointment:

"Article 1. The number of Local Representatives thus appointed shall not exceed five hundred.

"Article 2. On January 1st of each year, during the continuance of this contract the Company shall compute the number of thousands of insurance in force written during ten years from and after January 1st, in the United States, excepting the state of Indiana, upon which there [shall] have been paid, during the preceding year, one full annual premium, two semi-annual or four quarter annual premiums.

"Article 3. The State Life Insurance Company hereby agrees on the dates aforesaid, to credit Local Representative with such a sum of money from the expense element of its premiums as shall be obtained by dividing an amount of money equal to twenty-five cents for each one thousand dollars of insurance in force as above by the number of said Local Representative contracts remaining in force. The amount so credited to said Local Representative shall each year, on the anniversary of the date of this contract, be paid to him by said State Life Insurance Company subject to agreement of said Local Representative in his application here for said payment, being his compensation for his services as such Local Representative and for no other consideration.

"In witness whereof, The State Life Insurance Company has caused this contract to be signed by its president and

secretary, at its office in the city of Indianapolis, this 20th day of July, 1899.

"WILBUR S. WYNN,
Secretary.

"A. K. SWEENEY,
President."

In the cases of Blenkiron and Kennedy, it was shown that this special contract was issued to policy-holders of the company, and it would seem in most cases that they were issued to such policy-holders.

It is contended, on behalf of the complainants that, when the contract was so issued to a policy-holder, it constituted a rebate of premium, and was a violation of the mutuality of the company. In support of this position, a written opinion of the attorney general of the state of Indiana and a brief of the same official in the case of *Robert W. Lowery against the State Life Insurance Company*, 54 *Northeastern Reporter*, 442, were produced.

It may not be out of place to state here, that this department is opposed to premium rebates on principle, and will recommend an anti-rebate law in its first annual report.

The opinion and brief above mentioned lie before us, and, with all due respect to the attorney general of a great state, we must say that it has seldom been our lot to encounter documents more replete with sophistry. The opinion of the attorney general is begging of the question. He assumes that the contract under consideration is what it is not, and then argues from the assumption. But let it be said that the particular contract before the attorney general was one called the "Vice Chancellor's Contract." In the argument, it seems to be conceded that the contract was similar to the one we are considering. If it was not, then the attorney general's argument does not apply to this case.

The learned counsel for the complainants labored with great ingenuity to show the department that the policy of insurance and the local representative contract were an entirety. With all due respect to the ability of counsel, we are compelled to dissent from this conclusion. Where two contracts are not necessary complements of each other, not necessarily simultaneous in their execution and do not

purport upon the face to have the same consideration, the burden is upon the person alleging their entirety to prove the same. It was claimed that these contracts were offered promiscuously to any and everybody as an inducement to insure. If every person insured has one of these contracts, the mutuality of the insured can not be effected thereby. But such is not the case. It was affirmed and not denied that the contract had been issued to some persons not policy-holders. This being the case, it would show that it was practically an independent contract.

Application, herein before quoted, contains the following compound sentence:

"I hereby stipulate and agree that if I am appointed, I will aid in promoting and maintaining the company's business through its authorized agents, by recommending to them suitable persons whom they may secure for insurance; and that, during the continuance of my contract of appointment, I will, by my efforts so directed, maintain upon the books of the company at least \$5,000.00 of insurance."

The words, "by my efforts so directed" relate to the words, "by recommending to them suitable persons whom they may secure for insurance." For this service, the local representative is to be paid as follows: The company, for ten years, from January 1, 1899, is, at the end of each year, to set aside 25 cents from its expense fund for each \$1,000 of insurance in force, and then divide the sum obtained by the number of local representatives. The quotient is to be the compensation of each representative, which sum is to be credited to his premium.

Now we shall not undertake to discuss this procedure as a business proposition. Whether it will bring prosperity or disaster is not the question before us. Were we to examine into the method of doing business of every company in the state; and say A should not be allowed to do business, his method will bring disaster, and B shall be allowed because his method will bring prosperity, that would constitute ourselves guardians of every insurance company in the state, which the law never designed us to be.

It appears from the affidavit of Kennedy, and other admitted facts, that some very iridescent representations had been made by an agent of the company, which, together with the local contract itself, were the moving cause in inducing him to insure. An affidavit is only an ex-parte statement, where there is no opportunity for cross-examination. The affiant in this case is a highly respected gentleman. But to cancel the license of a foreign insurance company upon the sworn ex-parte statement of a gentleman who deems himself a wronged man, would be a length to which this department would not go. Nor do we think the facts sufficient.

That the local representative contract might be made to act as a rebate is obvious.

That its execution and delivery are, *ipso facto*, a rebate neither appears upon the face of the document, nor is established by the evidence *aliunde*.

Agents have gone to lawyers and said, "Insure with us, and give us the benefit of your influence, and you may have all of our collections in return. The percentage will amount to more than the premium you will have to pay." So, too, a physician might be appointed medical examiner on like terms. It is claimed that the company must have exceeded their five hundred limit. In support of this proposition it is argued that, as they have over 70 in Nebraska, and are doing business in twenty or more states, they must have over 500 local representatives. This is an unwarranted conclusion. No court would convict a criminal, or enter a civil judgment on such evidence.

There are some figures of the agent who solicited Mr. Kennedy. These figures are an example of a solicitor trying to make an actuary of himself, a sight more pitiful than little David in Saul's armor. Everyone is familiar with such sights. Not only in insurance solicitors, but in all classes of vendors in this competitive world of ours, is there a disposition to multiply the value of whatever they may have for sale by the table of Münchhausen rather than by that of Eratosthones. Such conduct may exceed the bounds of morality in many cases. But, did this de-

partment constitute itself the censor of the conduct of insurance solicitors with the general public, it would, in effect, be putting the whole state under its own guardianship. This is not the purpose of our creation.

We find that the State Insurance Company of Indianapolis, Indiana, is a solvent company; that there is nothing in its charter, constitution, by-laws or method of doing business, so far as such method has been shown us, in conflict with the laws of this state, except as hereinafter stated.

Were this a domestic company, we would dismiss the complaint without ceremony. But the statute of Nebraska contains the following section:

"Whenever the existing or future laws of any other state of the United States, or any foreign country, or the rules or regulations of any insurance department of any such state or country, provide that any insurance company organized under the laws of this state shall deposit securities in any such state or country for the security of policyholders, or shall provide for any payment of taxes, fines, penalties, certificates of authority, licenses, fees, or require any other duties, examinations, or acts other than are by the laws of this state required of such companies organized under the laws of such other state or country, then the insurance commissioner shall immediately require from every insurance company of any character whatever of such other state or country, transacting or seeking to transact business in this state, the like payment of all licenses, fees, taxes, fines, or penalties, taxes, deposits, statements, fines, penalties, act, examinations, or duties required by the laws of this state of the companies of such other states and countries." Section 40 of the Weaver law.*

The auditor of the state of Indiana is the chief of its insurance department.

Under the advice of the attorney general of that state, he has forbidden the issuance of such contracts as the one before us by an insurance company to its policyholders. This is a rule and regulation of the insurance department of Indiana.

*Compiled Statutes, 1899, ch. 43, art. 2.

Were a Nebraska life insurance company to go to Indiana, it would be forbidden to issue this kind of a contract to its policy-holders. Under the *lex talionis* of our reciprocity law, we must forbid Indiana companies to issue them in this state to their policy-holders. And it is so ordered. This order is made under and by authority of section 65 of the Weaver law;* and obedience hereof is enjoined.

With contracts already issued we can not interfere. Any person, desiring to be disengaged from a contract already made, must search for his remedy, if he has any, in a court of equity.

The local representatives come under the provisions of section 29 of the Weaver law.*

The company will be required to pay the fee of two dollars apiece and apply to have certificates issued to these agents.

W. A. POYNTER, *Commissioner*.

WILBUR F. BRYANT, *Deputy*.

NOTE.—Although the foregoing decision was rendered by a bureau afterwards declared unconstitutional (*State v. Poynter*, 59 Nebr., 417), it was adopted, and has since been followed by the constitutional department.—W. F. B.

*Compiled Statutes, 1899, ch. 43, art. 2.

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1. A child adopted under section 797 of title 25, chapter 57, General Statutes, 1873, would not inherit from the adopting parents in the absence of an affirmative statement to that effect or the use of language indicating an intent tantamount to such statement in the writing executed and filed under the statute. *Ferguson v. Herr*..... 649
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3. The statute prescribing the procedure in the adoption of children should be liberally construed, to the end that the proceedings had thereunder, and the decree of adoption made pursuant thereto, may be held valid; substantial compliance with the requirements of the statute being sufficient to sustain the validity of the decree of the probate court. *Idem*.
4. The decree rendered by the probate court under the provisions of chapter 2, title 25, Revised Statutes, 1866, fixes the status of the child and its adoptive parents; and when such decree by failure to prosecute error therefrom, is allowed to become final, it will, if in substantial conformity with the provisions and requirements of the statute, be conclusive upon all persons interested in the proceedings. *Idem*.
5. Under the provisions of section 580, chapter 1, title 16, Revised Statutes, 1866, a decree of adoption rendered by the probate court under chapter 2, title 25, Revised Statutes, 1866, could be reversed, vacated or modified by the district court at the instance of anyone having an appealable interest therein. *Idem*.
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Adoption—Concluded.

25, Revised Statutes, 1866, conferring upon the child full rights of inheritance from his adoptive parents, will not, in a collateral proceeding, many years after its rendition, and after the death of the adoptive parents, be held void for want of jurisdiction on the ground that the statement of the adoptive parents filed in the adoption proceedings fails in specific language to bestow upon the adopted child equal rights, privileges and immunities of children born in lawful wedlock, where a fair and reasonable interpretation of such statement is consistent with the intention so to bestow such rights, and it is manifest that the probate judge so understood and construed the statement of the adoptive parents, and the parents acquiesced in the decree throughout their lives. *Idem.*

7. Amendment of statute in regard to the adoption of children. *Idem.*

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2. An instruction which states that, if the owner of lands does not bring an action against one who wrongfully withholds possession within ten years after his cause of action accrues, he loses his right to maintain such action, without adding that defendant's possession must be continuous, open, notorious, exclusive and adverse during the full period of ten years, is misleading and erroneous. *Idem.*
3. An occupant who claims by adverse possession, must show that he occupied adversely during the entire period of ten years. *Idem.*
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3. Ruling, upon demurrer for misjoinder of causes of action, will not be reviewed on appeal. *Leavitt v. Mercer Co.*..... 31
4. By section 42, chapter 20, Compiled Statutes, a right of appeal is given to any person affected by any final order, judgment or decree of the county court in all matters of probate jurisdiction. *Gannon v. Phelan*..... 220

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24. Where the trial court rejects all the evidence offered by a party, in determining its admissibility, the complaining party will be given the benefit of every inference that might be reasonably drawn from the testimony received. *Horbach v. Boyd*..... 129
25. A reviewing court, in passing on a question of the admissibility of evidence, will give the benefit of every inference to the party complaining. *Idem*.
26. Ordinarily every presumption is in favor of the rulings of the trial court, and, if possible, the record should be so read as to sustain his action. But where a party is prevented from presenting his case all inferences are to be drawn in his favor, that the record will reasonably permit. *Idem*..... 131
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30. In an action on an insurance policy, where there is some uncontradicted evidence of the value of the property insured, a verdict based thereon will not be set aside for want of evidence to sustain it. *Nebraska Mutual Ins. Co. v. Sasek*, 17
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- To support a finding that a conveyance was fraudulent.
First Nat. Bank of Greenwood v. Reece..... 292
Columbia Nat. Bank v. Baldwin..... 732

Homestead.

- To sustain a homestead right. *Blumer v. Albright*..... 249

Husband and Wife.

- To sustain the judgment in action against married woman for necessaries. *Noreen v. Hansen*..... 858
 To sustain finding and decree setting aside deed from husband to wife. *Brun v. Brun*..... 782

Intoxicating Liquors.

- To support verdict for \$400 in liquor-damage case. *Gorey v. Kelly*..... 605
 To support a judgment dismissing a remonstrance. *Somers v. Vlazney*..... 383

Mortgages.

- To sustain finding that no proceedings had been had or commenced at law to recover any portion of mortgage debt. *Enyart v. Moran*..... 401

New Trial.

- To support the finding of court, (1) as to diligence on former trial; (2) as to sufficiency of evidence at second. *German Nat. Bank v. Atherton*..... 610

Parent and Child.

- To sustain verdict for services of child. *Crete Mutual Fire Ins. Co. v. Patz*..... 676

Records.

- To support an order made to correct the journal by a nunc-pro-tunc entry. *Harris v. Jennings*..... 80

Appeal and Error—Continued.

Evidence held sufficient:

Replevin.

To sustain a peremptory instruction in a replevin action.	
<i>Bender v. Kingman</i>	766
To sustain finding and judgment for plaintiff in replevin.	
<i>Saussay v. Lemp Brewing Co</i>	429, 431, 432
<i>Achenbach v. Pollock</i>	436

Trusts.

To sustain a finding and decree in an action to enforce an express trust. <i>Goble v. Swobe</i>	838
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Usury.

To support a plea of usury. <i>Hewit v. Bank of Indian Territory</i>	463
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34. Evidence held insufficient:

Dedication.

To sustain finding of dedication for highway. <i>Close v. Swanson</i>	389
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Estoppel.

To sustain a plea of estoppel. <i>Foxworthy v. Colby</i>	216
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Execution.

To sustain rulings upon objections to confirmation of sale.	
<i>Moulthan v. Apking</i>	378

Landlord and Tenant.

To sustain a voluntary surrender of personal property.	
<i>Hubenka v. Vach</i>	170, 173

Mandamus.

To show an adequate remedy at law—in the ordinary course—where there had been an application for a writ of mandamus. <i>Hopkins v. State</i>	10
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Mortgages.

To support a decree reinstating a mortgage. <i>Frerking v. Thomas</i>	193
To sustain a finding that a certain deed conveyed title absolute. <i>Decker v. Decker</i>	239

Negligence.

To sustain negligence on the part of plaintiff such as would relieve defendant of his liability as guarantor. <i>McDonald v. Tootle-Weakley Millinery Co</i>	577
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Replevin.

To warrant a peremptory instruction directing verdict for the plaintiff in a replevin action. <i>Godfrey v. Citizens' Nat. Bank</i>	477
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Trusts.

To support a decree declaring a resulting trust. <i>Doane v. Dunham</i>	135
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Warehousemen.

To support a warehouseman's lien. <i>Webster v. Keck</i>	1, 3, 6
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Appeal and Error—Continued.

35. A finding or judgment based on conflicting evidence will not be disturbed:

Banks and Banking. Insolvency. Owner of Stock.	
<i>Brinkworth v. Hazlett</i>	592
Execution. Appraisement. Confirmation of Sale.	
<i>Omaha Nat. Bank v. Sanders</i>	444
<i>Rose v. Siekman</i>	575

Fornication.

<i>Musfelt v. State</i>	445
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Insurance.

<i>Nebraska Mercantile Ins. Co. v. Sasek</i>	17
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Questions Presented in Briefs.

See, also, APPEAL AND ERROR, 32.

36. Questions discussed in briefs which are not properly presented by the record, will not be considered. *Moulthan v. Apking*..... 378
37. Objections argued in the briefs which were not presented to the trial court will not be considered. *Moore v. Jacobs*..... 72
38. Objections not argued in the briefs are deemed waived. *Idem*.
39. Assignments in a petition in error, not argued in the brief of plaintiff in error, will be considered waived. *Mayhew v. Knittle*..... 395
40. Where in an argument and brief, error is assigned for giving and refusing a group of instructions and no reason is pointed out, or authorities cited, by or from which the court can determine the several questions involved in the assignment, the matters should receive no consideration. *Albion Milling Co. v. First Nat. Bank of Weeping Water*..... 116

Records.

41. Stipulations not embraced in the record, will not be considered. *Bush v. Tecumseh Nat. Bank*..... 451
42. When the record in this court shows that an amended petition was filed in the district court, but does not show that a new cause of action was set up in the amended petition, the statute of limitations² will cease to run from the commencement of the action. *Idem*.
43. Where a bill of exceptions is quashed and the only assignments of error relate to the introduction of evidence, and a general assignment that the judgment is contrary to the law and the evidence, the reviewing court will only inquire whether the pleadings will support the judgment. *Gonzales-Mandelbaum Co. v. Broghamer*..... 83

Appeal and Error—Concluded.

44. When the judgment of a district court, in a proceeding in error to review the judgment of a justice of the peace, is before this court for review, the transcript must contain the judgment of the justice and such other proceedings as are up for review. *Saussay v. Lemp Brewing Co.*..... 429
45. The absence of an order of the court from the transcript can not be supplied by a recital in the bill of exceptions, certified to by the court reporter, if the judge, at the time of settling the bill of exceptions, certifies that the recital is false and orders it to be stricken out. *Idem.*
46. This court can not decide whether the district court erred in permitting an amendment to a return of process, unless the process and the original return thereto, or authenticated copies thereof are preserved in the bill of exceptions. *Idem.*

Scope and Extent of Review.

Final and interlocutory orders reviewable. See APPEAL AND ERROR, 2-4.

47. Where any matter of which a trial court took judicial notice is incompetent or improper to be considered, the supreme court will reject it on appeal, in determining whether the order complained of is sustained by sufficient evidence. *State v. Fawcett.*..... 496
48. The action or non-action of a trial court on a motion to vacate a decree in foreclosure, can not be reviewed on an appeal from a final order of confirmation of a judicial sale. *Omaha Loan & Trust Co. v. Walenz.*..... 89

Transfer of Cause. Requisites.

Sufficiency of appeal bond. See APPEAL AND ERROR, 7, 8.

49. In a law action, which can be reviewed only by proceedings in error, where a motion for a new trial on the ground of alleged errors occurring during the trial is seasonably presented, and not ruled upon until after rendition of the judgment, the time in which error proceedings may be begun will not begin to run until a ruling is made on the motion for a new trial. *City of Lincoln v. First Nat. Bank.*..... 725
50. A petition in error can not be treated as a nullity and entirely disregarded because authenticated in the name of plaintiff in error by her attorney, giving his name, each appearing only in typewriting. *Moore v. Moran.*..... 84
51. A bond given for the purpose of taking an appeal under the provisions of section 311 of chapter 23, Compiled Statutes, which runs to "the state of Nebraska," as obligee, instead of to the judge of the probate court, as required by said section, is not by reason thereof void. *Gannon v. Phelan.*.... 220

Appraisal. See EXECUTION.

Appropriation.

For salary of supreme court reporter. See STATE AND STATE OFFICERS, 1.

Assessment. See BENEFICIARY ASSOCIATIONS. DAMAGES. INSURANCE.

Assessment and taxing districts. See TAXATION, 9, 10.

Assessors. See STATUTES, 8.

It is no objection to the validity of a statute, imposing an additional duty on assessors, that no special provision for their compensation is made. *State v. Eskeu*..... 600

Assignment of Errors. See APPEAL AND ERROR, 1.

Assignments. See MORTGAGES, 1-3.

Associations. See BENEFICIARY ASSOCIATIONS. INSURANCE.

Attachment. See REPLEVIN.

Where an order of attachment issues in an action, and property is levied upon thereunder and an amended petition is subsequently filed, which, in addition to the cause of action stated in the original petition, sets forth another and different cause of action, and the first cause of action is dismissed before trial, the attachment is thereby dissolved, and an order for the sale of the attached property, in satisfaction of the judgment rendered on the second cause of action, is erroneous. *Hohway v. American Exchange Nat. Bank*..... 67

Attorney and Client.

Dishonesty of counsel as ground for vacation of judgment.

See JUDGMENT, 7.

Mistaken admission of counsel. See TRIAL, 1.

An attorney, in making a settlement with a client, and taking security for the amount due, waives his general or retaining lien on all papers in his hands save for services performed after such settlement. Lord Eldon cited with approval.

Webster v. Keck.....1, 4

Attorney General. See QUO WARRANTO.

Bail and Recognizance.

A recognizance conditioned for the appearance of the bounden principal at the next term of court, there to abide its order and judgment, is limited to the term at which it exacts appearance. *Perkins v. Milton*..... 848

Bailment. See WAREHOUSEMEN.

1. A lien does not attach in favor of a bailee of goods if inconsistent with the terms of the agreement, express or implied, under which his possession was obtained. *Webster v. Keck*, 1
2. Where a bailee contracts for a definite sum and reserves no lien, he has no right to retain the goods to enforce payment; this is especially true when the time of payment under the terms of the bailment is fixed after delivery. *Idem*.....1, 6

Banks and Banking. See ACKNOWLEDGMENT. TRUSTS.

Action to enforce stockholder's liability. See RECEIVERS.

Demand for payment of deposit as necessary to set in motion statute of limitations. See LIMITATION OF ACTIONS, 2.

1. If a deposit in a bank, or any part thereof, is a trust fund, and the bank has notice thereof, it will be liable to the true owner for any conversion to liquidate a debt of the trustee. *Globe Savings Bank v. Nat. Bank of Commerce*..... 413
2. An action for conversion will lie, in favor of the true owner of a trust fund, against a bank which knowingly appropriates such fund or a part thereof to reduce the debt of the trustee. *Idem*.
3. A bank has the right to appropriate the funds of a depositor to the extent of the indebtedness due from the depositor. *Idem*.
4. It is not necessary that a receiver of an insolvent bank procure executions against himself and a return of *nulla bona* on all claims against the bank before commencing action to enforce stockholder's liability. *Brinkworth v. Hazlett*..... 592
5. Where the president and cashier of a bank collects money and deposits it in the bank to the credit of a customer, the bank can not, to escape liability for the fraud of such president, deny his authority to represent it. *Citizen's Bank of Humphrey v. Fromholz*..... 284

Bastardy. See FORNICATION.

Acknowledgment.

1. In the writing described in section 31, chapter 23, Compiled Statutes, no distinct statement that the child is illegitimate and no intention to make the child an heir need appear. *Thomas v. Thomas*..... 581
2. The provision of section 31, chapter 23, Compiled Statutes, that an illegitimate child shall become the heir of the person who "shall in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child," is only a definition of statutory evidence. *Idem*.

Judgment.

3. The prosecutrix has no authority to compromise a judgment rendered in a bastardy proceeding. *State v. McBride*, 547
4. The prosecutrix in a bastardy proceeding, has no authority to release a judgment therein. *Idem*..... 547, 548
5. After a bastardy proceeding has been prosecuted to judgment, there is no authority for the execution and approval of a bond to save the county harmless. *Idem*..... 547, 550

Recognizance.

6. A recognizance in a bastardy proceeding, conditioned that

Bastardy—Concluded.

the accused shall appear at the next term of the district court to answer such accusation, and abide the order of the court, is limited to the term at which it exacts the appearance, and where the case is continued to a subsequent term without a renewal of such recognizance, and the defendant fails to appear at such subsequent term, there is no liability on the recognizance. *Perkins v. Milton*..... 848

Beneficiary Associations.

Mutual benefit insurance associations. See INSURANCE, 11-20.

1. By-laws of a mutual benefit association providing for the payment of assessments made during the month on a certain day and for suspension, without notice, of members in default, are self-executing. *Field v. National Council of Knights and Ladies of Security*..... 226
2. The financial secretary of a local council of a mutual benefit association, has no implied authority to waive any of the provisions of the by-laws governing the payment of assessments. *Idem*.
3. The suspended member of a mutual benefit association whose by-laws in the matter of suspension are self-executing, is entitled to no notice. *Idem*.
4. In order to obtain sick benefits as provided in the by-laws of a mutual benefit association, a member must bring himself within their terms. *Idem*.

Benefits.

Sick benefits. See BENEFICIARY ASSOCIATIONS, 4.

Billiards.

Licensing and regulating billiard room. See MUNICIPAL CORPORATIONS, 3, 4.

Bill of Exceptions. See APPEAL AND ERROR. MANDAMUS, 1.

A bill of exceptions may properly include a record of events which took place in the presence of the court and matters of which it took judicial cognizance if considered by the court in arriving at a decision. *State v. Fawcett*..... 496

Bills and Notes. See ALTERATION OF INSTRUMENTS. PAYMENT.

Assignment of note secured by mortgage. See MORTGAGES, 1.

Guaranty of note by married woman. See HUSBAND AND WIFE, 10, 11.

Actions.

1. A declaration on note of hand; allegation in vague terms by reference to note that 12 per cent. is lawful rate in Oklahoma; note bore date in Oklahoma; general denial. Allegation held sufficient to admit statute of Oklahoma in evidence. *Hewitt v. Bank of Indian Territory*..... 463

Bills and Notes—Concluded.

2. Proof that the note in question was given for a pre-existing debt, contracted and due in Oklahoma, is relevant as tending to establish an Oklahoma contract. *Idem.*

Construction.

3. Not error to refuse an instruction that if note was sent from Nebraska it must be governed in its provisions and effect by Nebraska laws. *Idem.*

Coupons.

4. The maker of a coupon-note owes no duty to the payee to examine the coupons as they are returned after payment. *Foxworthy v. Colby*.....216, 217

Negotiability.

5. An indorsement upon a promissory note as follows: "For value received I hereby assign and transfer the within bond and coupons thereto annexed, together with all my interest in and rights under the mortgage securing the same, to Coddington Savings Bank, without recourse," signed by the payee in the note, does not destroy its negotiability. *Coddington Savings Bank v. Anderson*..... 205

Payment.

6. If the maker elects to pay a negotiable promissory note to one who can not and does not produce the note, by so doing he assumes the burden of showing that the party to whom he paid it was the owner of the note, or was authorized by the owner to receive the money for him. *Idem.*

See PAYMENT, 3.

Bona-Fide Purchasers. See FRAUDULENT CONVEYANCES. VENDOR AND VENDEE.

Bonds. See APPEAL AND ERROR, 7, 8, 16-18, 51. BAIL AND RECOGNIZANCE. COSTS. EXECUTORS AND ADMINISTRATORS. JUSTICES OF THE PEACE. PRINCIPAL AND SURETY. SHERIFFS, CONSTABLES AND CORONERS.

1. A bond given to secure the performance of a contract between the principal and the obligee is without consideration, if the obligee is not bound by the contract. *Keith County v. Ogallala Power & Irrigation Co.*..... 35
2. The limit of damages for the recovery upon a penal bond in this state seems to be the amount of the penalty and interest from the time the condition is broken. *Benson v. Caulfield*.....101, 104

Bonus. See USURY.

Books of Account. See EVIDENCE, 3.

Breach.

Of bond. See EXECUTORS AND ADMINISTRATORS, 7, 8. SHERIFFS, CONSTABLES AND CORONERS.

Of warranty. See INSURANCE, 24.

Bridges.

Time to bring action for injury caused by defective bridge.
See LIMITATION OF ACTIONS, 6.

Briefs. See APPEAL AND ERROR, 36-40.

Burden of Proof. See EVIDENCE.

By-Laws. See INSURANCE, 6-8.

Cancellation of Instruments. See INSURANCE, 5. REFORMATION OF INSTRUMENTS.

Carriers.

Carriage of Passengers. Commencement and Termination of Relation. Contributory Negligence.

1. A passenger on a railroad train does not lose his character as such by leaving his car at a regular station from motives of either business or curiosity, although he has not yet arrived at the terminus of his journey. *Chicago, R. I. & P. R. Co. v. Sattler*..... 636
2. All passengers actually on the train, whether the same is moving or not, are passengers "being transported over its road" within the meaning of section 3, chapter 72, Compiled Statutes; and passengers who have left the train at the express or implied invitation of the carrier, for any necessary purpose incident to their journey, are passengers being transported within the meaning of said section. *Idem*.
3. Where a passenger leaves his car of his own volition, for some purpose of his own not incident to his journey, and at a place not designated for the discharge of passengers, he can not claim the protection of section 3, chapter 72, Compiled Statutes, although the carrier may, under some exceptional circumstances, still owe him the duty imposed on it by common law. *Idem*.
4. A through train between Denver and Chicago ran onto a side-track at an intermediate station to allow the passage of another through train from the east. A through passenger left his car, crossed the main track of the road to the depot, and went to a pump for a drink of water. He filled his cup from the pump, but, before drinking, heard the whistle of the incoming train, and started on a rapid run to regain his car. From the pump the track over which the incoming train was approaching could be seen for about one hundred feet, and three steps from the pump toward the track over which the train was approaching the track was visible for a mile or more. When the passenger reached the track the approaching train was about fifty feet distant from him, and running at a high rate of speed. The passenger attempted to pass in front of the train, and was struck by the engine and killed. *Held* that, under the circum-

Carriers—*Concluded.*

- stances, he was not "a passenger being transported over the road," within the meaning of section 3, chapter 72 of the Compiled Statutes, and the railroad was not liable for damages on account of his death because of his own negligence. *Idem.*
5. Where the train in which a passenger is being transported is run upon a switch to allow the passage of another train, or is stopped at a place other than that used by the carrier for receiving and discharging passengers, and the stoppage is not for the purpose of allowing passengers to board the train or alight therefrom, one who leaves the train must usually assume all the ordinary risks incident to his action. *Idem.*
 6. While, if a railway company permits the practice of passengers leaving and re-entering their train, while at a side-track at an intermediate station for the purpose of letting another train pass on the main track, it is bound to use reasonable care not to expose such passengers to unnecessary danger, yet it is not bound to so regulate its business as to make the side-track as safe a place of ingress and egress as the station platform; nor does it give any assurance, under such circumstances, to passengers that no trains will pass while they are crossing or recrossing the main track. Neither does the call of "all aboard," by the conductor of the side-tracked train, give any assurance to those who have left their train that they may cross the main track in safety without looking for approaching trains. *Idem*, 637, 639
 7. The words "while being transported over its road" in section 3 of the Passenger Act (ch. 72, Compiled Statutes) is a qualifying phrase intended to limit the liability of the company, and must be given the force of the legislative intent; but it was not intended to exclude all passengers who leave the car provided for them by the carrier. *Idem*.....637, 646
 8. A passenger on a railway train, while seated in the dining room of the company is under its control, and must conform to its rules, and is its passenger and as much entitled to its protection as while seated in its car proceeding on his journey. *Idem.*
 9. The phrase "while being transported over its road" used in the Passenger Act, at section 3, chapter 72, Compiled Statutes, was intended to include all passengers actually on the train, whether the train is moving or standing, and all such as leave the train for any necessary purpose incident to the journey, e. g., change of cars, procuring refreshments at a point where the same are furnished by the company, and where an express or implied invitation is extended for passengers to leave the car for that purpose. *Idem*, 637, 646, 649

Certiorari. See APPEAL AND ERROR.

Cesti Que Trust. See TRUSTS.

Chambers.

Power of judges at chambers. See JUDGES.

Chattel Mortgages.

1. A mortgage upon a stock of merchandise under the general description attaches only to such merchandise as was in stock when the mortgage was executed, and not to stock afterwards added by purchase. *Godfrey & Sons Co. v. Citizens' Nat. Bank of Norfolk*..... 477
2. An agreement providing for payment of a certain sum for a machine, the legal title to remain in the seller until the note is paid, is not a chattel mortgage, the failure to discharge which, on payment, would render the mortgagee liable for a penalty, under section 15, chapter 32, Compiled Statutes, but is an agreement which must be filed and recorded under section 26 of chapter 32 of the Compiled Statutes, which provides no penalty on failure to discharge such instrument. *McCormick Harvesting Machine Co. v. Mills*..... 166

Child. See ADOPTION. BASTARDY. PARENT AND CHILD.

Claims. See COUNTIES AND COUNTY OFFICERS. EXECUTORS AND ADMINISTRATORS.

Classification. See LICENSES. STATUTES, 7. TAXATION, 2, 3.

Clerks of Courts. See SUPREME COURT REPORTER.

Cohabitation. See FORNICATION.

Collateral Attack. See ADOPTION. JUDGMENT, 1.

Collection. See BANKS AND BANKING. TAXATION, 1.

Common Carriers. See CARRIERS.

Compensation. See ASSESSORS. EMINENT DOMAIN. JUSTICES OF THE PEACE, 6.

Of reporter of supreme court. See STATE AND STATE OFFICERS, 1.

Compromise and Settlement. See BASTARDY, 3.

Conduct of Counsel. See JUDGMENT, 7. TRIAL, 1.

Conflict of Laws. See BILLS AND NOTES, 3.

Consideration. See BONDS. FRAUDULENT CONVEYANCES, 3.

Constitutional Law. See LICENSES. STATUTES. TAXATION, 2, 3.

Distribution of Powers.

1. The theory that the judiciary, in issuing a mandamus to a member of the executive branch of the government, is thereby indirectly, and in violation of the constitution, exer-

Constitutional Law—Concluded.

cising power properly belonging to the executive department, has been repudiated by this court in a long line of decisions. *State v. Savage*..... 684

2. The right of the courts to determine all judicial questions, whenever or however they may arise, is given by the constitution in explicit terms and is indisputable. *Idem*.
3. Clear and incontestable is the right of the executive officers named in the constitution to exercise all powers properly belonging to the executive department. *Idem*.

Due Process of Law.

4. Compiled Statutes, chapter 77, article 5, sections 4, 6, authorizing the foreclosure of tax liens by proceedings *in rem* to which the land alone is a party, where the owner thereof is not known, and providing that a sale under decree therein shall cut out all pre-existing rights or liens, are not in conflict with either the state or federal constitutions, as depriving persons of property without due process of law. *Leigh v. Green*..... 533

5. The statute (Compiled Statutes, ch. 53, sec. 1) making the property of a married woman liable for the payment of all debts contracted for necessities furnished to her family after execution against her husband for such indebtedness has been returned unsatisfied, is not in conflict with section 3 of the bill of rights. *Noreen v. Hansen*..... 858

Imprisonment for Debt.

6. The provisions of section 154 of the general revenue law authorizing fine and imprisonment as a means of enforcing a license tax does not trench upon the constitution and is therefore valid. *Rosenbloom v. State*..... 342

Police Power.

7. The legislature can not, under the guise of police regulation, arbitrarily invade private property or personal rights. The test when such regulations are called in question is whether they have some relation to the public health or public welfare, and whether such is, in fact, the end sought to be attained. *Iler v. Ross*..... 710

Continuance.

As part of trial. See JUSTICES OF THE PEACE, 6.

When the issues are regularly made up the cause stands for trial. A party to an action has no right to a continuance on the ground that the issues were formed sooner than he anticipated. *Palmer v. Caywood*..... 372

Contracts. See ALTERATION OF INSTRUMENTS. BONDS. HUSBAND AND WIFE. MARRIAGE. REFORMATION OF INSTRUMENTS. SPECIFIC PERFORMANCE. PRINCIPAL AND AGENT. STATUTE OF FRAUDS. SUNDAY.

Contracts—Concluded.

1. A construction of a written contract, which requires the rejection of certain words, is unwarranted where the rejection of such words would defeat the intention of the parties. *Ricketts v. Buckstaff*..... 851
2. In the interpretation of a written ambiguous contract, that construction will be preferred which gives effect to all the parts of the instrument, rather than one which renders a portion redundant and useless. *McGavock v. Omaha Nat. Bank*..... 440
3. While a third party may maintain an action or a defense under an agreement between others made for his benefit, it must appear that there was an intent by the promisee or person with whom the agreement was made to secure some benefit to such third party, and, also, that there existed some privity between the promisee and the party to be benefited. *Frerking v. Thomas*..... 193
4. The intention of the parties is to be gathered from the entire contract, and not from any clause contained therein. *Royal Neighbors of America v. Wallace*..... 330

Conversion. See BANKS AND BANKING. TRUSTS.

1. An instruction, in an action for conversion, that, if conversion was found, both buyer and seller were liable, is not error, where the circumstances which would and would not make the sale a conversion have been fairly indicated. *Pecha v. Kastl*..... 380
2. Conversion is a wrongful taking. *Idem*..... 380, 382
3. It is not necessary to the maintenance of an action for conversion, by reason of the wrongful sale of a plaintiff's goods, to show that defendant exercised control over the property with knowledge of the plaintiff's rights, or that a demand was made for the goods, while they were in defendant's possession. *Gore v. Izer*..... 843
4. Where no estoppel on the ground of giving of a redelivery bond as surety is pleaded, and no offer made to show knowledge by the wife at the time of the facts, it is not error to refuse evidence that the debt for which property was levied upon, was contracted through faith on the creditor's part in the husband's ownership of the property in question. *Runquist v. Anderson*..... 755
5. Subsequent statements by a purchaser at execution sale, are not competent proof of facts stated as against one suing for conversion by such sale of the property sold. *Idem*.

Coram Nobis.

- Writ of error *coram nobis* has no existence in this jurisdiction.
In re William Rhea, Coram SULLIVAN, C. J...... 885

Corporations. See BANKS AND BANKING. TAXATION, 4-6.

1. A fraternal beneficiary association, having a grand lodge and principal place of business in this state, and which is doing an insurance business therein, is a domestic corporation or association, under the provisions of section 91, chapter 43, of the Compiled Statutes; and service of summons should be made upon it according to the provisions of chapter 2 of the Code, providing for service of summons on corporations and insurance companies. *Grand Lodge A. O. U. W. v. Bartes*..... 800
2. The rule is well settled that a bank or other corporation, being once charged with notice of the character of a transaction, continues to be affected by such notice, whatever changes may occur in the personnel of its working force. *United States Nat. Bank of Holdrege v. Forstedt*..... 855

Costs.

In Criminal Prosecutions.

1. Sections 500 and 501 of the Criminal Code authorize the taxation of costs only in cases where a crime has been charged and there has been a conviction in accordance with established procedure. *Speer v. State*..... 77
2. The defendant in a proceeding for the prevention of crime, may be taxed with costs only (1) where he is held to bail by the district court; and (2) where for want of bail, he is sent to prison. *Idem*.

On Appeal.

3. The provisions of sections 612 to 616 of the Code of Civil Procedure, and especially of the latter section, do not authorize by summary proceedings the entry of a judgment for costs against sureties on a cost bond which is required to be given by the plaintiff in error or appellant under rule 12 adopted by this court, with reference to security for costs in actions brought here on error or by appeal. *Dunn v. Bozarth*..... 862
4. The supreme court is not authorized by the issuance of a writ of *scire facias*, or on a motion and notice to the adverse party in lieu thereof, to order an execution to issue against sureties on a cost bond, given under rule 12, for the costs made in the action in which the cost bond was given, and which are assessed against a plaintiff in error or appellant, or for the amount thereof remaining unpaid. *Idem*.
5. The right to enforce the liability of a surety on a cost bond is by proceeding in an ordinary civil action on the undertaking and in pursuance of the rules governing civil actions generally. *Idem*.

Counter-Claim. See SET-OFF AND COUNTER-CLAIM.

Counties and County Officers.

Payment of judgment against county. See MANDAMUS, 5.

Appeal from County Board.

1. A notice of appeal addressed to the county clerk, is served within the meaning of section 37, chapter 18, article 1, Compiled Statutes, 1901, by delivery to such clerk. *Jarvis v. Chase County*..... 74
2. In an appeal from the decision of a board of county commissioners disallowing a claim, the delivery of the notice to the county clerk is a necessary inference from a statement in the record that it was filed with him by the appellant. *Idem*.

Claims. Issuance of Warrants.

3. As article 6 of chapter 77, Compiled Statutes, which provides for the levy and collection of a judgment tax, makes no provision for its disbursement, the usual course, to wit, drawing the money by warrant, must be pursued. *State v. Scott's Bluff County*..... 419
4. It is the duty of the board of county commissioners to draw a warrant in favor of a judgment creditor for the amount of any judgment tax collected, upon demand, when any considerable amount is collected in the hands of the county treasurer. *Idem*.
5. Public policy and due regard for the interests of the taxpayers of the county, would require the commissioners to disburse the fund as fast as collected in any considerable amount, rather than to have the fund accumulate while interest accumulates on the judgment. *Idem*..... 419, 424

Contracts.

6. Where county commissioners, acting for a precinct which has voted bonds in aid of internal improvements under section 14, chapter 45, Compiled Statutes, have entered into a contract differing substantially as to the parties thereto or terms thereof from that voted upon, it is not binding upon the municipality. *Keith County v. Ogallala Power & Irrigation Co*..... 35
7. Where bonds are voted by a precinct in aid of a work of internal improvement under section 14, chapter 45, Compiled Statutes, the terms of the proposition set forth in the notice of election are to be taken as defining the authority of the county commissioners in contracting with reference to such improvement. *Idem*.

Taxes.

8. Where the entire levy of taxes of a county for the year was within the constitutional limit, the levy of a four-mill bridge tax was not invalid, though the county board had before the levy was made illegally transferred an unexpended balance

Counties and County Officers—Concluded.

in the bridge fund remaining from the levy of the previous year, to the general fund. *Union P. R. Co. v. Cheyenne County*..... 777

Courts. See FORCIBLE ENTRY AND DETAINER. MANDAMUS.

Effect of overruling previous decision. See RES JUDICATA, 5.

Judicial power. See CONSTITUTIONAL LAW, 1, 2.

Jurisdiction at chambers. See JUDGES.

1. Saving the exceptions mentioned in the statute, the supreme court has no power to disturb a final judgment made by it at a previous term. *In re William Rhea, Coram SULLIVAN, C. J.*..... 885
2. The only authority the supreme court has to take cognizance of crimes, is that given by the constitution in the grant of appellate jurisdiction. *State v. Missouri P. R. Co.*..... 679
3. When the legislative thought is cast in the mold of the criminal law, it will be presumed, nothing appearing to the contrary, that the remedies contemplated were those generally used in courts exercising criminal jurisdiction. *Idem.*

Creditors' Bill.

1. Under a prayer for general relief in a creditors' bill, a sale of property not attached may be decreed, where the facts entitling a party to such sale are alleged and proved, although the petition asks specifically only for a sale of attached property. *Columbia Nat. Bank v. Baldwin*..... 732
2. The allegation that an execution has been returned *nulla bona* is not necessary to render a creditors' bill invulnerable to demurrer. *Howard v. Raymers*..... 213
3. Execution issued; *nulla bona*; levy on alienated realty; creditor entitled to proceed at once in equity. *Idem.*

Criminal Law and Procedure. See BASTARDY. COSTS. FORNICATION. INDICTMENT AND INFORMATION. INTOXICATING LIQUORS.

Criminal jurisdiction of supreme court. See COURTS.

Termination of prosecution. See MALICIOUS PROSECUTION, 5.

1. Where, before prosecution and while under no restraint, a person remained silent when being charged with a crime, this is competent evidence as an admission of guilt. *Musfelt v. State* 445
2. The provisions of section 9, of the "Maximum Freight Law," are to be enforced by criminal procedure. *State v. Missouri P. R. Co.*..... 679
3. Where a defendant, charged with a misdemeanor, is at liberty, on bail or otherwise, while his case is being tried, and voluntarily absents himself from the court room at the time the jury returns its verdict, his counsel being present, and

Criminal Law and Procedure—Concluded.

no objection being made to such absence, defendant will be held to have waived his right to be present at such time.

Peterson v. State..... 875

Crops. See LANDLORD AND TENANT.

Right of purchaser at foreclosure sale. See EXECUTION, 21.

Damages.

For illegal sale of liquors. See INTOXICATING LIQUORS, 1-4.

For wrongful discharge of employee. See MASTER AND SERVANT.

1. In an action for damages for injuries to the person and property of the plaintiff, the testimony clearly showed substantial damage to person and property; a verdict for \$1 was grossly inadequate. *Carpenter v. City of Red Cloud*.... 126

2. In an action for personal injuries, an instruction should be given on the proper measure of plaintiff's damages in case he should prevail. *Idem*.....126, 129

3. Under section 432 of the Code of Civil Procedure, the court, on the determination of an issue of law, or when a party is in default, may, at the request of the party not in default, assess damages on proof without the intervention of a jury. *Bankers' Reserve Life Ass'n v. Finn*..... 105

Deceit. See FRAUD.**Declarations. See EVIDENCE.****Dedication.**

1. Evidence held insufficient to establish dedication for a highway. *Close v. Swanson*..... 389

2. To constitute a valid dedication of private property for a public highway, it must clearly appear that there was an intended dedication on the part of the owner, and an acceptance on the part of the public by user or otherwise. *Idem*.

Deeds. See ESTOPPEL, 1. HOMESTEAD. HUSBAND AND WIFE.

Absolute deed as mortgage. See MORTGAGES, 9, 10.

Parol evidence. See EVIDENCE.

Definitions. See WORDS AND PHRASES.**Delivery.**

Delivery of notice as service. See COUNTIES AND COUNTY OFFICERS, 1, 2.

Demand.

For payment of deposit by bank as necessary to set in motion statute of limitations. See LIMITATION OF ACTIONS, 2.

For trial by jury. See JURY.

Deposits. See BANKS AND BANKING.

Deposits in Court.

Compensation for property condemned for right of way. See
EMINENT DOMAIN.

Descent and Distribution. See ADOPTION. BASTARDY. EXECUTORS
AND ADMINISTRATORS.

1. G. died intestate, leaving surviving her neither issue nor husband, father, mother, brother, sister, nephew, niece, grandfather, grandmother or grandchildren; her nearest relatives being two uncles, an aunt, cousins and second cousins. Under our statute of descent, the two uncles and the aunt took the entire estate, to the exclusion of cousins and second cousins. *Clary v. Watkins*..... 386
2. It is the object of our statute to cut off inheritance *per stirpes* among collaterals where at any point beyond the children of brothers and sisters the surviving children are of unequal degrees. In such case those nearest in degree take the estate, to the exclusion of those more remote. *Idem*.
3. The "claim," which can furnish the basis for an action to compel a devisee to return a portion of estate assigned to him by proper probate proceedings, must be one allowed in the probate court, or "established" by proper legal proceedings elsewhere, as a liability of the estate involved. *Brinkworth v. Hazlett*..... 592

Description.

In notice of tax sale. See TAXATION, 14.

Directing Verdict. See TRIAL.**Disabilities.**

Effect as to limitation of action. See LIMITATION OF ACTIONS, 6.

Discharge. See MASTER AND SERVANT. RELEASE.**Discretion of Court.** See APPEAL AND ERROR, 5, 6.

As to examination of witnesses. See WITNESSES, 4.

Relief against mistaken admission at trial. See TRIAL, 1.

Dismissal and Nonsuit. See APPEAL AND ERROR, 7-9.

Dismissal of a cause of action on amendment of petition as dissolution of order of attachment. See ATTACHMENT.

Dissolution. See ATTACHMENT.**Divorce and Alimony.**

A judgment for alimony in favor of a wife, rendered in an action for divorce against the husband, is a lien upon the family homestead, the title whereof is in the husband. *Fraaman v. Fraaman*..... 472

Documents. See EVIDENCE, 3-8.**Dormant Judgments.** See JUDGMENT, 11.

Due Process of Law. See CONSTITUTIONAL LAW.

Ejectment. See POSSESSION.

1. A judgment in ejectment is binding upon all parties to the action. *Van Etten v. Test*..... 407
2. An answer denying that plaintiff's testatrix on a date named "was the owner in fee simple and entitled to possession" of the land in controversy, and denying that she died "on or about" said date, being consistent with ownership after said date and before she died, and also with ownership before and at said date, subject to a right of possession in someone else, does not put the plaintiff upon proof of title. *Knight v. Denman*..... 814
3. There is a distinction between actions to maintain title and those for the recovery of possession only. *Idem*.....814, 817

Eminent Domain.

1. A railway company, after having prosecuted proceedings to obtain a right of way to a final determination, is estopped to repudiate or abandon them, and is bound to pay the amount of the award to the land owner. *Brown v. Chicago, R. I. & P. R. Co*..... 62
2. The deposit of money by a railway company with a county judge pending a condemnation of right of way, does not discharge the obligation of the company until withdrawal of the money by the property owner. *Idem*.
3. Money due from a railway company for condemnation for right of way under the statute, may be recovered without resort to the fund deposited with the county judge. *Idem*.
4. The constitutional provision that the property of no person shall be taken or damaged for public use without just compensation is mandatory; and this right can not be impaired or modified by legislation or otherwise. It is not competent for either the legislature or the courts to appoint some person without his consent to receive the money in payment. The right of the property owner to payment is unqualified. *Idem*.....62, 65

Equalization.

Of taxes. See MUNICIPAL CORPORATIONS, 1, 2. TAXATION, 7, 8.

Equity. See ESTOPPEL. EXECUTORS AND ADMINISTRATORS, 16. INSURANCE, 11.

Filing of cross-bill out of time. See JURISDICTION.

Estoppel. See HUSBAND AND WIFE, 6-8. PRINCIPAL AND AGENT, 1, 2.
To abandon proceedings to obtain right of way. See EMINENT DOMAIN, 1.

To deny authority of officers of bank. See BANKS AND BANKING, 5.

Estoppel—Concluded.

Of tenant to dispute landlord's title. See LANDLORD AND TENANT, 2.

By Deed.

1. A grantor in deed with covenant and warranty, is not estopped thereby from asserting a new title, adverse to his grantee, which he has acquired by subsequent entry and adverse possession. *Horbach v. Boyd*..... 129

Equitable Estoppel.

2. An estoppel by representation does not arise, where there is no intention and there could be no reasonable expectation that such representation was to be acted upon. *Laing v. Evans*.... 454
3. Instruction that the giving by plaintiff, as surety, of a re-delivery bond for property levied upon, does not of itself estop her from maintaining, after its return and a vain demand for it, an action for its conversion by the execution creditor approved. *Runquist v. Anderson*..... 755
4. It is of the essence of estoppel that the estoppel asserter has relied to his disadvantage upon the conduct or silence of the other party. *Decker v. Decker*..... 239
5. The defendant was not estopped from asserting his title to the land for having received his pro-rata share of rents and profits collected by the administrator who took possession of his land supposing it to be that of the intestate, defendant being at the time in a distant state, and there being nothing in the record to connect him with knowledge that the rents were derived from land to which he claimed title. *Idem*.
6. Parties will not be heard to complain of a procedure adopted at their request, or with their consent. *Holway v. American Exchange Bank*..... 67, 70
7. One can not occupy the position of demanding or receiving pay upon a contract, and at the same time insist that the contract is not in force, and of no validity. *Houston v. Farmers & Merchants' Ins. Co.*..... 138, 142
8. Evidence insufficient to sustain a plea of estoppel by knowledge of a material alteration of a note. *Foxworthy v. Colby*, 216

Evidence. See ADVERSE POSSESSION, 1, 3. AFFIDAVITS. APPEAL AND ERROR, 29-35. BASTARDY, 2. BILLS AND NOTES, 1, 2. CONTRACTS. CONVERSION. CRIMINAL LAW AND PROCEDURE. DEDICATION. EXECUTION, 14. EXECUTORS AND ADMINISTRATORS, 8. FORNICATION. FRAUDULENT CONVEYANCES, 6. INSURANCE, 9. INTOXICATING LIQUORS, 7, 15. JUSTICES OF THE PEACE, 5. MALICIOUS PROSECUTION. MORTGAGES, 5, 12. REFORMATION OF INSTRUMENTS. TRIAL. TRUSTS, 12. WITNESSES.

Evidence—Continued.

Burden of proof. See **BILLS AND NOTES**, 6. **MASTER AND SERVANT**, 2. **QUO WARRANTO**. **RAILROADS**. **TAXATION**, 12. **TRUSTS**, 8. **WILLS**, 7.

Declarations. See **CONVERSION**, 5. **PRINCIPAL AND AGENT**, 3.

Admissions.

1. Statements made by a party to a suit, to a third person, may be received in evidence against him, and are not open to the objection that they are hearsay evidence. *Allen v. Hall*, 256

Best and Secondary Evidence.

2. In deciding a motion for a nunc-pro-tunc order, the district court may act upon any satisfactory competent evidence in support thereof, although minutes of the proceedings, or other writing appearing in or upon the records of the court are regarded as a better class of evidence. *Harris v. Jennings*..... 80

Documentary Evidence.

3. In a suit against a bank, book entries made by its officers or bookkeeper in the regular course of business, are competent evidence as admissions against interest. *Globe Savings Bank v. Bank of Commerce*..... 413
4. One party may introduce the books of his adversary without the preliminary proof necessary in other cases. *Idem*..... 413, 415
5. A book purporting to contain the written laws of a foreign jurisdiction, proves itself and is admissible as evidence without other authentication. *Hewitt v. Bank of Indian Territory*..... 468
6. The authenticity of a volume which it is claimed contains the statutes of a foreign state or territory, can not be established by the mere declaration of counsel as to what the volume is. *Idem*.
7. The appropriate evidence of the written laws of a foreign state or territory, is that prescribed by section 905, Revised Statutes U. S., and by sections 419 and 420 of the Code of Civil Procedure. *Idem*.
8. A record kept under the ordinances of a city for the evident purpose of assisting the board of health in the conduct of the affairs of that office, is not such a public record as is entitled to admission in evidence to show the truth of the matters therein recited, and especially should it be rejected as evidence when offered to establish a fact which would not be admissible against a party because of its privileged character. *Sovereign Camp of Woodmen of the World v. Grándon*..... 39

Evidence—Concluded.

Judicial Notice.

9. This court can not take judicial notice of the records of the district court. *Bush v. Tecumseh Nat. Bank*..... 451

Parol Evidence.

To establish trust. See TRUSTS, 12.

10. Parol evidence tending to establish a separate oral agreement between the parties to a written contract, as to matters upon which such contract is silent, and not against its terms, is admissible. *Huffman v. Ellis*..... 623
11. Where a deed is assailed by third parties as fraudulent, and proof by them is introduced to impeach the recited consideration, the grantee may show by parol evidence the actual consideration, though different from the one recited in the deed. *Columbia Nat. Bank v. Baldwin*..... 732
12. In an action by a grantee of a deed against his grantor to recover for a breach of covenant against incumbrances, parol evidence is inadmissible to show that taxes were, by contemporaneous oral agreement, excepted from the terms of the deed. *Stanisics v. McMurtry*..... 761

Weight and Sufficiency.

13. Ordinarily, a preponderance of evidence will suffice in a civil action. But a greater degree is required to overcome the express terms of a conveyance. *Doane v. Dunham*..... 135

Exceptions. See APPEAL AND ERROR, 12. BILL OF EXCEPTIONS.

Execution. See EXECUTORS AND ADMINISTRATORS, 3, 4. INTERNAL REVENUE.

Appraisal.

1. The object of the statute requiring the appraisal before sale, is to fix the value on which the two-thirds minimum price is predicated; its purpose is the protection of those whose interests are being divested. *Wells v. Frazier*.....370, 372

Deduction of Liens.

2. Where property sold in execution of decree of foreclosure was struck off for more than two-thirds of its gross value, the wrongful deduction by the appraisers of one of the liens in suit will afford no ground for vacating the sale. *Peck v. Starks*..... 341
3. Appraisers appointed to fix the amount of a judgment debtor's interest in real estate for the purposes of a judicial sale, have no power, under the Code, to deduct or apportion liens, according to area, upon an entire tract, for the purpose of determining a judgment debtor's interest in a distinct parcel of the entire tract. *Fraaman v. Fraaman*..... 472

Designation of Parties.

4. An appraisal of the interests in land about to be sold at

Execution—Continued.

judicial sale, is not invalidated because the names of the owners of the equity of redemption, are designated *et al.*
Wells v. Frazier..... 370

Objections.

5. After land has been sold in execution of a decree of foreclosure, it is too late to question the appraisement, except in case of fraud. *Farmers and Merchants' State Bank v. Thornburg*..... 76
6. An objection to an appraisal of real estate for the purposes of a judicial sale, to be available, must be made and filed before a sale thereof is had. *Wells v. Frazier*..... 370

Officer Making Appraisal.

7. A deputy sheriff may act for and in place of the sheriff in making an appraisal of real estate for the purposes of a judicial sale in the execution of a decree of the court. *Idem.*

Presumptions.

8. Where several writs were issued to a sheriff commanding him to execute a decree of foreclosure, the presumption is, nothing appearing to the contrary, that the appraisement under which the sale was made was valid. *Omaha Nat. Bank v. Saunders*..... 444

Valuation.

9. An order confirming a judicial sale, will not be set aside on review for a mistaken valuation by appraisers, in the absence of any abuse of discretion on the part of the trial court. *Merchant v. Baumeister*..... 91
Peck v. Starks..... 341
Rose v. Siekman..... 575
10. An honest difference of opinion between appraisers and witnesses, as to the value of real estate sold under a decree of foreclosure, affords no sufficient ground for setting the sale aside. *Gibson v. Sweet*..... 550 .
11. Evidence held to sustain the trial court in refusing to set aside the appraisement as too low. *Union Trust Co. v. Davis*, 340
12. Where real estate sells for more than two-thirds of its value, as alleged by those objecting, no prejudice results. *Rose v. Siekman*..... 575
13. Evidence held sufficient to sustain rulings of trial court on objections as to valuation of land for appraisal. *Moulthan v. Apking*..... 378

Notice of Sale.

14. In a foreclosure sale, the affidavit proving publication, as well as the sheriff's return, is sufficient evidence of the publication of the notice of sale. *Haines v. Bellinger*..... 73
15. In a foreclosure sale, the affidavit proving publication may

Execution—Continued.

be made immediately after the last publication, even though that be less than thirty days after the first. *Idem.*

Sale in General.

16. The authority of a sheriff or other officer to sell real estate under a decree of foreclosure, does not depend upon the procurement and filing of certificates of liens. *Hart v. McDonnell*..... 856
17. Where property brings at judicial sale two-thirds of its gross value, the sale should be confirmed notwithstanding the failure of the sheriff to file in the office of the clerk of the district court in due time the treasurer's certificate showing the amount of a tax lien. *Idem.*

Officer Making Sale.

18. An objection that the officer who made the sale was not qualified to do so, *held* without merit. *Moseley v. Fillebrown*, 580
19. A deputy sheriff may make a foreclosure sale, which his chief is authorized to make. *Union Trust Co. v. Davis*..... 340

Place.

20. The south door of the court house is "at the court house," within the meaning of section 503 of the Code of Civil Procedure. *Peck v. Starks*..... 341

Possession by Purchaser.

21. Annual crops growing on the land do not pass to the purchaser at judicial sale; and for the purpose of saving the debtor's rights thereto, these annual crops will be regarded as personalty. *Aldrich v. Bank of Ohio*..... 276

Postponement.

22. There is no provision of the Code authorizing the adjournment of an execution sale. *Fraaman v. Fraaman*..... 472

Rents and Profits.

23. In an action to foreclose a mortgage where the mortgagee has taken possession and the mortgage has been prosecuted to a decree and sale of the premises, all the parties to such proceedings are thereby concluded as to rents and profits received by the mortgagee while in possession. *Felino v. K. S. Newcomb Lumber Co.*..... 335
- See MORTGAGES, 6.

Return.

24. It is not required that a return to an order of sale shall be made within sixty days. *Pratt v. Lean*..... 576

Surplus.

25. A junior mortgagee not a party to a suit to foreclose a first mortgage, is entitled to any money resulting from the sale remaining in the sheriff's hands after the satisfaction of the first mortgage. *Milligan v. Gallen*..... 561

Execution—Concluded.*Stay of Execution.*

26. The right of a judgment creditor to take out an execution on his judgment, is a substantial right. This right can only be taken away or suspended by some act, suit or proceeding for this purpose in compliance with law. *Halmes v. Dovey*..... 122

Writ. Form and Requisites.

27. Among the requisites of a valid execution, are that it must state the name of the court from which it was issued, the name of the county wherein the judgment was rendered, the amount of the judgment and the time of its rendition. *Idem*.....122, 125

Executive Power. See CONSTITUTIONAL LAW, 3.

Executors and Administrators. See APPEAL AND ERROR, 20. DESCENT AND DISTRIBUTION. LIMITATION OF ACTIONS, 3.

1. The decree of a county court, after examination of the final report and accounts of an executor finding that he has assets in his hands and ordering them distributed among creditors and legatees, creates a personal liability in the executor, and has the same force as any other judgment. *Lydick v. Chaney*..... 288
2. The liability of an executor or administrator created by a final decree upon an accounting, may be enforced either directly against the administrator or by a suit upon his bond. *Idem*.
3. An execution may issue to enforce a decree rendered on appeal from a decree upon the final accounting of an executor or administrator. *Idem*.
4. A decree of distribution may be enforced by execution wherever the executor is able to respond. *Idem*.....288, 291
5. The surviving husband of a decedent held entitled, under section 42, chapter 20, Compiled Statutes, to appeal from the final accounting of an administrator. *Gannon v. Phelan*..... 220
6. Whether G., as administrator, has the right to appeal, not determined. *Idem*.
7. Failure to comply with a decree of the county court requiring an administrator to pay in money found on his final settlement to be due the estate, is a breach of the conditions of his bond under the statute. *Mortenson v. Berghold*..... 208
8. In an action for breach of an administrator's bond in failing to pay over money on his final accounting, evidence of matter relating to the conduct of the administration, prior to the decree, held properly rejected, as immaterial and *res judicata*. *Idem*.

Executors and Administrators—Concluded.

Allowance of Claims.

9. An administrator can not waive the defense of non-claim to the prejudice of his estate, either by agreement with the claimant or by neglecting to plead such defense. *Fitzgerald v. First Nat. Bank of Chariton*..... 260
10. When a county court fixes a time for the presentation of claims against an estate and enters an order barring all claims not then presented, as provided by section 217, chapter 23, Compiled Statutes, such time may be extended on application of a belated claimant, provided such application is for good cause, and is made within six months of the time first fixed and within two years of the appointment of the commissioners. *Idem*.
11. The county court has no jurisdiction over a claim against the estate of a decedent which is not filed for allowance until it has been finally barred by the statute of non-claims. *Idem*.
12. Where a claim against a decedent's estate is not presented before the time first fixed for the presentation of claims, its allowance afterwards, unless upon special proceedings to revive the commission and to extend the time for the presentation of claims, is error in either the county or appellate court. *Idem*.

Quieting Title.

13. The right of an administrator to the real estate of a decedent, is possessory only. *Youngson v. Bond*..... 615
14. The interest of an administrator in the real estate of his intestate, is not sufficient for a successful action *quia timet*. *Idem*.

Sales.

15. Because litigation is pending involving the title to one of several parcels of real estate for which license is prayed by an administrator to sell for the purpose of paying debts owing by the estate, that fact will not render erroneous an order of the district court, otherwise proper, granting a license to sell such real estate for the purpose mentioned. *Martin v. Bond's Estate*..... 868
16. An application to a district court by an executor or administrator for license to sell real property is not an action in equity within the purview of section 675, Code of Civil Procedure. *Poessnecker v. Entenmann*..... 409

Exemptions. See HOMESTEAD.

Fees. See COMPENSATION.

Filing. See APPEAL AND ERROR, 21. ATTACHMENT, 1. JUDGMENT, 3, 6, 8, 11. NEW TRIAL. TIME.

Final Orders. See APPEAL AND ERROR, 3, 4, 48.

Findings. See APPEAL AND ERROR, 28, 29, 31, 32. REFERENCE.

Fines. See PENALTIES.

Fire and Police Commissioners. See RES JUDICATA, 4.

Fixtures.

When it is evident that houses were intended as permanent annexations to the freehold, they become a part of the realty, and pass with a conveyance of it, and that without regard to the character of the foundations on which they stand.

Moore v. Moran..... 84

Forcible Entry and Detainer.

1. In 1899 there was no valid statute authorizing an appeal to the district court in actions of forcible entry and detention.

Babby v. Musser..... 175

2. The jurisdiction of the district court in forcible entry and detainer is derivative only and can not be aided by consent of parties. *Idem*.

Foreclosure. See EXECUTION. MORTGAGES.

Foreign Statutes. See EVIDENCE, 5-7.

Forfeitures. See INSURANCE. USURY, 4.

Fornication.

1. In a prosecution for the offense of living together in a state of fornication, it is not error to instruct the jury that it is not necessary the cohabitation be either open or notorious. *Musfelt v. State*..... 445

2. Evidence sufficient to sustain a verdict of guilty of fornication. *Idem*.

Franchises.

Taxation of franchises of corporation. See TAXATION, 4-8.

Fraud. See STATUTE OF FRAUDS.

1. Petition in action to recover money fraudulently obtained, held to state a cause of action. *Gandy v. Cummins*..... 312

2. Where one gives an honest opinion as to the financial worth and standing of a third party, and as to whether or not such third party is entitled to credit, based on information which he, in turn, imparts to the person making the inquiry at the time such opinion is given, the mere fact that he was mistaken in his opinion will not make him liable in an action for fraud and deceit, to one who acts thereon. *Albion Milling Co v. First Nat. Bank of Weeping Water*..... 116

Frauds, Statute of. See STATUTE OF FRAUDS.

Fraudulent Conveyances. See CREDITORS' BILL. HOMESTEAD, 5.

1. Evidence held sufficient to support a finding that a conveyance from a father to his son was fraudulent. *First Nat. Bank v. Reece*..... 292

Fraudulent Conveyances—Concluded.

2. Evidence *held* sufficient to support a finding that certain conveyances were fraudulent. *Columbia Nat. Bank v. Baldwin*. 732
3. A parol trust, if clearly established, is a sufficient consideration to support an executed deed against the grantor's creditor's. *Idem*.
4. He who is interested to uphold the conveyance is entitled to show the real consideration in order to maintain it. *Idem*.
5. A purchaser from a debtor who, by the transfer, seeks to place his property beyond the reach of his creditors, is protected only to the extent of the consideration with which he has parted before notice of the fraud. *Bender v. Kingman*. 766
6. Admission of testimony regarding conversations had in presence of the purchaser of a fraudulent vendor pending the transfer of the property, charging him with notice of the fraudulent intent of his vendor, *held* not error. *Idem*.
7. The doctrine of constructive fraud does not obtain in this state, as by virtue of section 20, chapter 32, Compiled Statutes, the question of fraudulent intent is made a question of fact, and not of law. *Idem*.
8. Fraudulent intent which is declared to be a question of fact by statute, does not differ in kind or degree from other questions of fact; and when the evidence adduced in a case upon the fraudulent intent is so conclusive that reasonable minds can not differ as to the conclusion to be drawn therefrom, it is not error for the court to direct a verdict accordingly. *Idem*.
9. Evidence *held* insufficient to warrant a peremptory instruction directing a verdict for plaintiff in a replevin action by a chattel-mortgagee against an execution creditor of the mortgagor, who attacks the validity of the mortgage. *Godfrey & Sons Co. v. Citizens Nat. Bank*. 477
10. Where a chattel mortgage is withheld from the record for sixteen months, and evidence as to whether it is done by agreement of parties is conflicting, and the rights of creditors have intervened, the question of validity is for the jury. *Idem*.
11. Where a creditor takes possession of merchandise, claiming an agreement with the debtor by which the latter turned over the goods as a pledge to secure the debt, and there is evidence that the creditor took possession by virtue of a chattel mortgage, the character of his possession is for the jury. *Idem*.

Garbage.

Contract for removal of garbage. See MUNICIPAL CORPORATIONS, 7-10.

Gifts. See HUSBAND AND WIFE, 1.

Governor. See MANDAMUS, 7. STATE AND STATE OFFICERS.

Guaranty.

Of note by married woman. See HUSBAND AND WIFE, 10, 11.

1. It is not required that exclusive reliance be placed upon the guaranty to enable the plaintiff to recover. *McDonald v. Tootle-Weakley Millinery Co.*..... 577
2. Evidence held insufficient to sustain negligence on the part of plaintiff such as would relieve defendant of his liability as guarantor. *Idem.*

Harmless Error. See APPEAL AND ERROR, 13-15. INSTRUCTIONS, 7, 8.

Hawkers and Peddlers.

1. The law imposing an occupation tax upon peddlers, is sufficiently certain to be capable of enforcement. *Rosenbloom v. State*..... 342
2. Compiled Statutes, 1901, article 1, chapter 77, sections 152-154, imposing a license tax upon peddlers, has for its object the raising of revenue, and its enactment was an exercise of the taxing power. *Idem.*
3. The provisions of the general revenue law imposing an occupation tax on peddlers, were enacted by the legislature in the exercise of its taxing power and are valid. *Gerrard v. State*..... 368

Health.

Removal of garbage. See MUNICIPAL CORPORATIONS, 7-10.

Highways. See DEDICATION.

Time to commence action for injury caused by defective bridge. See LIMITATION OF ACTIONS, 6.

Establishment.

1. Where no order has been made by a county board laying out or establishing a traveled road, the public has no rights in such road as against a landowner in adverse possession, except such as are acquired by dedication and user. *Close v. Swanson* 389
2. To establish a highway by prescription, there must be a continuous user by the public under a claim of right, distinctly manifest by some appropriate action on the part of the public authorities, for a period equal to that required to bar an action for the recovery of title to land. *Hill v. McGinnis*..... 187
3. A prescriptive right to a strip of land for a public highway, can not be acquired by lapse of time where the roadway is through the inclosed premises of the owner, and the use thereof is permissive only, and the roadway is changed from time to time to suit the convenience of the owner,

Highways—Concluded.

and no act of dominion or control is exercised by the authorities. *Idem.*

Rights of Adjacent Landowners.

4. A landowner, through or adjacent to whose lands is constructed and maintained a public road, has a right to such advantage from it by way of drainage as is incidental to its existence, and does not inconvenience the public or individuals, or injure the public work. *Thom v. Dodge County..* 845

Homestead.

Abandonment.

1. Where a husband and wife depart from the homestead for the purpose of business, pleasure or health, but coupled with such departure is the intention not to return, the wife can not be deprived of her homestead right unless she participated in the intention not to return. *Blumer v. Albright....* 249
2. A departure from the homestead for the purpose of business, pleasure or health, does not constitute an abandonment thereof, unless coupled with such departure is the intention not to return. *Idem.*

Establishment and Extent.

3. A mere permissive residence in the family of one's father-in-law, will establish no homestead rights in the father-in-law's land. *Howard v. Raymers.....* 213
4. Where premises are claimed to constitute a part of the homestead of a debtor because adjoining premises are occupied as a residence of a debtor's family, it is necessary to show a homestead right in the premises on which the family live. *Idem.*

Protection of Homestead Interest.

5. Where a conveyance of premises occupied as a homestead is set aside as fraudulent, the homestead right will be protected. *First Nat. Bank of Greenwood v. Reece.....* 292

Rights of Surviving Husband.

6. Section 17 of the homestead act exempts to the owner of the fee the homestead premises against all debts existing or created previous to or at the time of the death of the wife, even though he may no longer be the head of a family. *Idem.*

Transfer.

7. Evidence examined and held to sustain the findings of the trial court that the premises in controversy were the homestead of the appellee, and that she did not voluntarily execute the deed of conveyance. *Blumer v. Albright.....* 249
8. Under the laws of this state, the acknowledgment of the wife to a deed conveying a homestead is essential to its validity. *Idem.*
9. Coercion of wife. *Idem.....* 249, 256

Homicide.

Definition of murder in the first degree. Dissenting opinion of
SEDGWICK, J. *Rhea v. State* (Appendix)..... 889

Husband and Wife. See DIVORCE AND ALIMONY. HOMESTEAD. MARRIAGE. WITNESSES, 2, 3.

Action by wife for illegal sale of liquors to husband. See INTOXICATING LIQUORS, 1-4.

Coercion of wife. See HOMESTEAD, 9.

Charge of wife's separate estate with debts contracted for necessities after execution and return against husband as deprivation of property without due process of law. See CONSTITUTIONAL LAW, 5.

When action accrues against married woman. See LIMITATION OF ACTIONS, 5.

Conveyances and Contracts Between Husband and Wife.

1. Where a husband places the title to lands in his wife without consideration, whether by conveyance directly or by procuring conveyance to her by others, a gift is presumed. *Doane v. Duhham*..... 135
2. Where a husband who can neither read nor write English conveys the homestead to his wife, relying upon representations that the consideration was permanent reconciliation, a home with his wife and a life annuity of \$200, but the deed as executed gave the wife the option of receiving the husband or excluding him and paying the annuity, the deed can not be upheld. *Brun v. Brun*..... 782
3. Evidence held sufficient to sustain a finding and decree setting aside a deed from husband to wife. *Idem*.
4. A contract calculated to bring about a separation between husband and wife is contrary to public policy and will not be upheld. *Idem*.
5. A contract calculated to bring about a separation between husband and wife, is distinguished from those cases where a separation has already taken place, to take place *eo instanti* in pursuance of the agreement. *Idem*..... 782, 790

Wife's Separate Estate.

6. The making of a lease as the "authorized agent" of her husband, does not estop a married woman in whose name title to such land had stood for eight years to claim title against the notary taking the acknowledgment. *Laing v. Evans*..... 454
7. Acts of a husband in leasing land and taking notes to himself for rent, where the title remained all the time in the wife, do not show such ostensible ownership in him as to preclude her from claiming title against his creditors. *Idem*.

Husband and Wife—Concluded.

8. A wife who in 1881 procured her husband to buy from the state school land for her in his own name, who leaves the contract in his name until 1896 (when the state is paid from the proceeds of the sale of a part of the land, and the deed is made to the wife), who has, in the meantime, permitted the husband to lease the land, take notes for rent in his own name, and manage it as his own, is estopped to claim, as against a creditor who has, with knowledge of such management, but with no actual knowledge of the contract, loaned the husband money in 1894 on the faith of his ownership of the land. *Idem.*

Necessaries Furnished Family.

9. Evidence in an action against a wife for necessaries held to sustain a judgment against her. *Noreen v. Hansen*..... 858

Guaranty of Note.

10. A married woman is liable on her guaranty of a promissory note owned by her and made payable to her order, and the purchaser of such note is not driven to an inquiry of the purpose to which she intends to devote the proceeds of a sale thereof. *Kitchen v. Chapin*..... 144
11. The fact that the proceeds of the sale of a note owned by a married woman would go into her husband's business would not affect her power to guarantee the payment of the note and to bind herself by such guaranty. *Idem*.....144, 146

Illegitimate Children. See BASTARDY.

Impeachment. See WITNESSES.

Imprisonment.

For debt. See CONSTITUTIONAL LAW, 6.

Indemnity. See GUARANTY. SHERIFFS, CONSTABLES AND CORONERS.

Indictment and Information. See INTOXICATING LIQUORS, 5, 6.

An information which charges in the language of the statute, or in words equivalent thereto, the commission of an offense is sufficient. *Peterson v. State*..... 875

Information. See INDICTMENT AND INFORMATION. QUO WARRANTO.

Injunction. See TAXATION, 1.

Insanity.

Effect of mental incompetency, caused by injury, as to time of bringing action. See LIMITATION OF ACTIONS, 6.

Insolvency. See BANKS AND BANKING. TRUSTS.

Instructions. See ADVERSE POSSESSION, 2. APPEAL AND ERROR, 40. BILLS AND NOTES, 3. ESTOPPEL, 3. FORNICATION. INTOXICATING LIQUORS, 1-3, 8. MUNICIPAL CORPORATIONS, 12, 13. PAYMENT, 1. PLEADING, 3.

Instructions—*Concluded.**Applicability to Pleadings and Evidence.*

1. It is error to submit to a jury by instructions questions of fact not embraced in the issues, or concerning which there is no evidence. *Thom v. Dodge County*..... 845
2. It is not error to refuse an instruction that is broader than the evidence. *Crete Mutual Fire Ins. Co. v. Patz*..... 676

Cumulative Instructions.

3. It is not error to leave out of a definition of conversion the element of plaintiff's right of possession, where that question is fairly submitted in another instruction. *Pecha v. Kastl*, 380
4. It is not error to refuse an instruction where the same ground is covered by one already given. *Crete Mutual Fire Ins. Co. v. Patz*..... 676
5. It is not error to refuse an instruction, where, at the request of the same party, another one is given, making the giving of the first requested unnecessary. *Nebraska Mercantile Mutual Ins. Co. v. Sasek*..... 17

Curing Erroneous Instructions.

6. The error in giving an incorrect or misleading instruction is not cured by giving other instructions which state the law correctly, where the several instructions are inconsistent or conflicting, or where, taken as a whole, they may convey an erroneous impression. *Knight v. Denman*..... 814

Harmless Error.

7. The refusal to give an instruction correctly stating a rule of damages, but which became immaterial on account of the finding of the jury, is not reversible error. *Gullion v. Traver*..... 51
8. The giving of an instruction which is fairly within the issues raised by the pleadings and the evidence produced on the trial, and which the record shows did not mislead the jury, though not technically correct, is error without prejudice. *Allen v. Hall*..... 256

Objections.

9. Objections to instructions *en masse* will not be considered where any of those so complained of, are correct. *Runquist v. Anderson*..... 755

Requests.

Requests for instructions already given. See INSTRUCTIONS, 4, 5.

10. Error can not be predicated upon an instruction for not being sufficiently explicit, unless counsel have prepared and tendered a proper one. *Musfelt v. State*..... 445

Insurance. See **BENEFICIARY ASSOCIATIONS.**

Actions on Policies.

Service of process on beneficiary association. See **CORPORATIONS, 1.**

1. Under a life insurance policy providing for payment in ninety days after satisfactory proof of death, an objection to such proofs, which in no way impeaches the sufficiency of the showing of the death of the assured, but complains as to the condition of his health when first insured, shows no ground for delaying action more than ninety days after such proof was submitted. *Bankers' Reserve Life Ass'n v. Finn*..... 105
2. A petition upon a policy of life insurance which avers that "all of the conditions of said policy to be performed and fulfilled by said Harold H. Finn or plaintiff have been duly performed and complied with," is a compliance with section 128 of the Code of Civil Procedure. *Idem*.....105, 107
3. That the risk assumed by an acceptance of an application of insurance would depend largely on the facts sought to be elicited by the questions under consideration is a matter of common knowledge; that the nature of the answers of the assured, and of the report of the medical examiner based thereon served as an inducement to the acceptance of the risk, is too clear to admit of doubt. Such being the case, the materiality of such answers is a question upon which reasonable minds could not differ and its submission to the jury was error. *Royal Neighbors of America v. Wallace*.....330, 334

Additional Insurance.

4. Where it is provided in an insurance policy that no additional insurance shall be taken out on the property described therein without the consent of the company, procuring additional insurance without such consent renders the policy void. But the secretary or other officer of the company, empowered to waive such condition forbidding additional insurance, may do so by an indorsement on the policy, and thereby revive and continue it in force after violation of such condition as a contract of insurance. *Nebraska Mercantile Mutual Ins. Co. v. Sasek*..... 17

Cancellation of Policy.

5. There is no doubt of the right of an insured to have his policy canceled upon the terms provided by section 42, chapter 43, of the Compiled Statutes. *Houston v. Farmers & Merchants' Ins. Co.*.....138, 140

Contract. By-Laws.

6. When a mutual insurance company is organized under the provisions of the laws of this state, the provisions of the

Insurance—Continued.

- statute authorizing its organization, the articles of incorporation, and by-laws of the company, the application for membership and the certificate of membership constitute the contract between the company and its policy-holder. *Farmers' Mutual Ins. Co. v. Kinney*..... 808
7. When a member of a mutual insurance company agrees in his application to be governed by the by-laws and rules "now in force or hereafter adopted by said company," he will be bound by subsequently enacted by-laws of his company the same as he is by those in force at the time his certificate of membership is issued; provided that such subsequent by-laws are reasonable in their nature, and properly adopted in conformity with the authority conferred by the statute upon such company. *Idem*.
 8. A by-law of a mutual insurance company, which provides that the company shall not be liable for any loss that may occur while a member is in default of the payment of a legal assessment, is a reasonable by-law, and will be upheld. *Idem*.
 9. Conduct of an officer of an insurance company may be evidence of the construction put upon its constitution by such officer. *Sovereign Camp of Woodmen of the World v. Grandon*..... 39, 44
 10. Rebate. Reciprocity statute. *In re State Insurance Company of Indianapolis, Indiana* (Appendix)..... 835
See, also, Index to Notes.

Mutual Benefit Insurance.

Insurance in mutual benefit association. See BENEFICIAL ASSOCIATIONS.

Assessments.

11. An assessment for the express purpose specified in the by-laws of a beneficiary life insurance association, will not be treated as invalid solely because it may not appear to be abstractly equitable. *Chapple v. Sovereign Camp of Woodmen of the World*..... 55
12. Substantial compliance with a by-law of a beneficiary life insurance association, empowering two designated officers of the society to make an assessment on a certain day in each calendar month, and requiring the clerk of a superior branch of the order to immediately give notice of the making of the same to the clerks of inferior associations, will be sufficient to uphold the assessment. *Idem*.

Forfeiture. Suspension.

13. If a beneficiary insurance association continues to collect dues and mortuary assessments from a member who has forfeited his beneficiary certificate, after knowledge of such

Insurance—Continued.

forfeiture by its officers and agents intrusted with the duty of making such assessments, it shall be held to have waived such forfeiture, without regard to any restrictions or limitations incorporated in its certificates of membership or by-laws with respect to the power or authority of such persons to make such waivers. *Modern Woodmen of America v. Colman*. 162

14. In all cases of the forfeiture of a policy and its subsequent waiver, the underlying principle is the same, viz.: The association, with full notice or knowledge, through its accredited agents, of the facts by reason of which the contract of insurance might have been avoided, has chosen to treat it as valid and in force, and to receive a consideration for so doing. *Idem*.
15. When the by-laws of a beneficiary life insurance association expressly declare that the fact of delinquency in payment of an assessment shall work a forfeiture of membership, and that thereafter the delinquent shall not be "entitled to receive the pass-word, or to participate in any of the business or social proceedings of his camp, he may be admitted to a meeting to pay his arrearages, but must retire if he does not pay same," such forfeiture is not waived by the mere fact that the member "was present at all the meetings and participated in all the social proceedings of said camp, up and to the time of his death," which occurred soon after he had become delinquent. *Chapple v. Sovereign Camp of Woodmen of the World*. 55
16. Although a by-law of a beneficiary life insurance association requires the clerk of the local body of the order to notify the members of their liability for assessments, his failure so to do will not prevent a forfeiture for non-payment, if another by-law expressly provides that such failure shall effect such forfeiture. *Idem*.
17. The clerk of a local camp of a beneficiary life insurance association, who is entrusted with the duty of collecting the assessments, is for that purpose the agent of the superior branch or body of the society for which the service is performed, and if in making such collection, he adopts a course of business or conduct, upon which the members rely as proper and sufficient and to which they conform, in good faith, neither they nor their beneficiaries will be deprived of the rights and benefits of membership, because the course pursued is in violation of the known rules of the order. *Held*, good law, but inapplicable to the case at bar. *Idem*. 55, 61
18. Where a member of a beneficiary life insurance association loses his right instantly by the fact of delinquency and no

Insurance—Continued.

- action of the association is required under the by-laws, the failure of members to resent his intrusion into their meetings, or their forbearance to eject him therefrom and to forbid him to participate with them socially, having no tendency to mislead, will not reinstate him. *Idem*..... 55
19. The constitution of a mutual benefit association provided for the suspension of a member, and for his reinstatement, if in good health, on payment of arrearages, and that if the delinquent member did not appear in person, he should send a written statement, on an official form, to the effect that he is in good health, waiving rights of reinstatement if such statement should be untrue. *Held*, That where a suspended member signed the required statement and deposited it in a letter box, enclosed in an envelope stamped and addressed to the clerk of the camp, he sufficiently complied with the requirements, although the certificate did not reach the clerk until the death of the suspended member. *Sovereign Camp of Woodmen of the World v. Grandon*..... 39
- Officers and Agents.
20. Notwithstanding cunningly devised by-laws and stipulations of beneficiary associations, the clerks of local camps are, in the matter of collecting and remitting assessments and the waiver of forfeitures, the agents of the societies, and not of their respective camps or of their members. *Modern Woodmen of America v. Colman*.....162, 164
- Premium. Default in Payment.
21. Where credit is extended and a note is taken for the premium to be paid for a policy of insurance, and both the note and insurance policy provide that in case the note is not paid at maturity the policy shall be suspended, inoperative and of no force or effect so long as the note or any part thereof remains due and unpaid, the insurance company can not be held liable for a loss occurring after the maturity of the note and while the same is unpaid. *Houston v. Farmers & Merchants' Ins. Co.*..... 138
22. A fire insurance policy contained the following provision: "In case of any loss of said property, either partial or total, while said note or any part thereof remains overdue and unpaid, this company shall not be liable for such loss, nor shall the payment of said note or the receiving or retention of the proceeds, or any part thereof, by this company, render it liable for any loss occurring while said note, or any part thereof, remains due and unpaid; nor shall such payment or retention be construed to be a waiver of any condition in this policy or application. The payment of the premium, however, revives this policy and reinstates the same

Insurance—Concluded.

for the remainder of the term." The collection of the premium after a loss by the assured, which occurred after the maturity of the note, and while the same was unpaid, would reinstate the policy for the remainder of the term, but would not constitute a waiver on the part of the company such as to make it liable for the loss. *Idem*.

Receipt of Delinquent Assessment After Loss.

23. Where all the property covered by a policy of a mutual fire insurance company is not destroyed, the receipt of subsequent assessments by the company, from a member who has sustained a loss while his policy was suspended for default in the payment of assessments, will not operate as a waiver of such default. *Farmers' Mutual Ins. Co. v. Kinney*..... 808

Warranties.

24. Where to hold that certain statements made in an application for insurance are warranties would defeat the obvious purpose of the parties to the contract, they will be held to be mere representations, even though it is stipulated in the policy that they are warranties. *Royal Neighbors of America v. Wallace*..... 336

Interest. See USURY.

Evidence held to support instruction that twelve per cent. per annum is a lawful rate of interest in Oklahoma. *Hewitt v. Bank of Indian Territory*..... 463

Internal Revenue.

1. The omission of a revenue stamp from a certificate of appraisal will not invalidate such appraisal. *Moseley v. Fillibrown* 580
2. The certificate of prior incumbrances and of appraisal of land for the purposes of sale in foreclosure proceedings are not required to be stamped, under the provisions of the war revenue act of 1898. *Moulthan v. Apking*..... 378

Intervention.

To plead usury. See MORTGAGES, 7.

Intoxicating Liquors.*Action for Loss of Support.*

1. Instruction that plaintiffs in action against liquor sellers are entitled to compensation for loss of support caused by the husband and father's intoxication from all who sold or gave him the liquor causing such intoxication, held not to assume improperly any continuity of such intoxication. *Gorey v. Kelly*..... 605
2. Instruction that the word "support" used in sections 15 and 18 of chapter 50, Compiled Statutes, does not mean the bare necessities of life, but such means as would enable

Intoxicating Liquors—*Continued.*

- plaintiffs to live in a "style and condition and with a degree of comfort suitable and becoming to their station in life," *held proper. Idem.*
3. An instruction that the furnisher of any part of liquor causing the loss of support is liable to the full extent of the loss is correct. *Idem.*
 4. In an action against a liquor seller for civil damages verdict for \$400 *held* not excessive. *Idem.*

Keeping for Unlawful Sale.

5. An information charging one with keeping and having in his possession intoxicating liquors with intent to sell the same without a license is not fatally defective because it fails to describe the place where the liquors are kept with that degree of certainty and particularity required before a search warrant is authorized to issue under the provisions of section 20, chapter 50, Compiled Statutes. *Peterson v. State* 875
6. Where an information charges the keeping in one's possession intoxicating liquors with the intent to sell the same without a license, alleging the time and the town, county and state in which the offense is charged to have been committed, it is proper to charge that the time and place as alleged in the information must be found from the evidence in order to warrant a conviction; the word "place" having reference to the town and county, and not to the particular building in which such liquors may have been kept. *Idem.*
7. In a prosecution under section 20, chapter 50, Compiled Statutes, for keeping intoxicating liquors for sale in violation of law, the possession of such liquors by the accused is presumptive evidence of guilt, in the district court as well as before the examining magistrate, unless the accused "shall satisfactorily account for and explain the possession thereof," and that they were not kept for an unlawful purpose. *Idem.*
8. Instruction requested by the defendant and modified by the court before being given, *held* properly modified. *Idem.*
9. Evidence in an action for keeping liquor with intent to sell the same illegally, *held* sufficient to sustain a verdict of guilty. *Idem.*
10. Alleged errors, in a prosecution for keeping liquor for unlawful sale, found not well taken. *Idem.*

Licenses.

11. Under section 25 of chapter 50, Compiled Statutes, a petition for a license to sell malt, spirituous and vinous liquors

Intoxicating Liquors—Concluded.

is sufficient if signed by thirty resident freeholders of the ward or village where the sale of such liquors is to take place; where there are less than sixty, a majority is sufficient. *Somers v. Vlazney*..... 383

12. Under section 3, chapter 50, Compiled Statutes, the right to protest or remonstrate against the issuance of a license is not confined to residents of the ward or village where the intoxicating liquors are sought to be sold. *Idem*.

13. Evidence held sufficient to support a judgment dismissing a remonstrance. *Idem*.

Sale on Sunday.

14. A sale of intoxicating liquor by a servant on Sunday, without the express or implied authority of his master, is not a sale by his master within the meaning of section 14, chapter 50, Compiled Statutes. *Moore v. State*..... 557

15. To justify a conviction under section 14, chapter 50, Compiled Statutes, 1901, it must appear that the defendant, either by himself, or agent or employee, sold or gave away intoxicating liquors on the day of a general or special election, or on the first day of the week, commonly called Sunday. *Idem*.

16. Whether instructions by a master to his servant not to sell or give away intoxicating drinks on Sunday or on an election day were colorable only, or were given in good faith, in the expectation that they would be obeyed, and with the expectation that they should operate as a limitation upon the servant's authority, is a question for the jury. *Idem*.

17. Where there is no intention by a saloon-keeper to withhold from his bartender the authority to sell on Sunday, an instruction not to sell on that day is of no consequence. *Idem* 557, 560

Issues. See JUSTICES OF THE PEACE. PLEADING.

Joinder.

Of parties. See TAXATION, 15.

Judges. See COURTS. JUSTICES OF THE PEACE. MANDAMUS.

Jurisdiction at chambers. See MANDAMUS, 4.

A judge of the supreme court, at chambers, is without authority to enjoin, stay or reprieve the execution of a death sentence. *In re Rhea, Coram SULLIVAN, C. J.*..... 885

Judgment. See BASTARDY. CREDITORS' BILL. EJECTMENT. EXECUTORS AND ADMINISTRATORS, 1, 3. REPLEVIN. RES JUDICATA.

Decree of adoption. See ADOPTION.

Direction to enter judgment below. See APPEAL AND ERROR, 9.

Judgment—Continued.

Finality of judgment to warrant review. See **APPEAL AND ERROR**, 2-4.

On pleading. See **PLEADING**, 10.

Order establishing highway. See **HIGHWAYS**, 1.

Collateral Attack.

1. Where a district court has acquired jurisdiction, it has the right to decide every question which arises in the case, and its orders and judgments, however erroneous, can not be collaterally assailed. *Fraaman v. Fraaman*..... 472

Conclusiveness of Judgment.

2. A former judgment is conclusive when the parties and the question involved in the two suits are the same, although the property claimed in them may be different. *Hanson v. Hanson*..... 506

Filing Transcript.

3. The filing of the transcript of a judgment of a justice of the peace or county court with, and the docketing of it by, the clerk of the district court, do not make it a judgment of the district court. *Farmers' State Bank v. Bales*..... 870

Lien.

4. A judgment lien is created by statute, and is destroyed by statute if its provisions requiring the taking-out of an execution are not complied with. *Halmes v. Dovey*..... 122
 5. A judgment valid as soon as rendered, is not a lien to the conclusion of a subsequent purchaser without notice until properly indexed. *German Nat. Bank of Beatrice v. Atherton* 610
- See, also, **JUDGMENT**, 12.

Opening or Vacating.

6. The filing of a motion to vacate a decree under the provision of subdivision 3 of section 602 of the Code of Civil Procedure does not of itself have the effect of avoiding or suspending further proceedings in the execution of the decree, nor would a sale made in pursuance thereof be invalidated because such motion had not been acted on by the court nor waived by the party filing the same. *Omaha Loan & Trust Co. v. Walenz*..... 89
7. Dishonesty of his attorneys whereby a client is prevented from making a defense to a pending suit and suffers default, is "unavoidable casualty or misfortune" within the Code of Civil Procedure, section 602, authorizing the vacation of judgments on that account. *Anthony v. Karbach*..... 509
8. Where it appears by the record that an answer was actually tendered by the plaintiff, along with his petition for the vacation of judgment, and was before the court in such a

Judgment—Concluded.

way as to enable the court to pass on its sufficiency, the fact that it was not formally filed is immaterial. *Idem.*

9. Under the Code of Civil Procedure, section 603, providing that a petition to vacate a judgment shall be verified by affidavit, an affidavit on information and belief is sufficient. *Idem.*
10. In the absence of a request for special findings, a general finding in a proceeding to vacate a judgment is sufficient for an order of vacation. *Idem.*

Suspension and Revival.

Motion to vacate judgment as suspension of proceedings. See JUDGMENT, 7.

11. A judgment rendered by a justice of the peace, a transcript of which is duly filed and docketed in the office of the clerk of the district court, becomes dormant where no execution thereon is issued after five years from the date of its rendition, and the filing of a transcript of such judgment in the district court, will not have the effect of keeping it alive for five years from the date of such filing. *Farmers' State Bank v. Bales* 870
12. When a dormant judgment is revived, it will operate as a lien only on the real estate which the judgment debtor may own at the time of the revivor. *Halmes v. Dovey*..... 122

Judicial Notice. See BILL OF EXCEPTIONS. EVIDENCE, 9.

Judicial Sales. See EXECUTION.

Jurisdiction. See FORCIBLE ENTRY AND DETAINER. MANDAMUS. .

Criminal jurisdiction. See COURTS.

Of judge at chambers. See JUDGES. MANDAMUS, 4.

Where a cross-bill asking affirmative relief against a co-defendant is filed out of time, and no summons is issued thereon, or served upon such co-defendant, and no appearance is made thereto, the court has no jurisdiction to try the issues tendered by such cross-bills. *Youngson v. Bond*..... 615

Jury. See INSTRUCTIONS. TRIAL.

Right to trial by jury. See DAMAGES, 3.

An objection "that the court is without jurisdiction to hear a cause on the equity side of the court," is not a sufficient demand for a jury, even if the action be one of law. *Goble v. Swobe* 838

Justices of the Peace.

Appeal.

1. An appeal undertaking given under section 1007 of the Code of Civil Procedure is valid and effective, although the only surety by whom it was executed is a non-resident of the county in which the action is pending. *Leidigh v. Pribble*... 860

Justices of the Peace—Concluded.

2. A party who obtains a dismissal of an appeal on the ground that his adversary failed to comply with an order requiring him to furnish a resident surety on an appeal undertaking is not, in an action upon such undertaking, estopped from asserting that the bond is valid and binding upon the non-resident surety by whom it was executed. *Idem.*
3. The undertaking of a surety upon an appeal bond given under the statute relative to appeals from justices of the peace is, in substance, that he will satisfy any judgment against his principal that may result from a trial in the district court or from a failure to effectively prosecute the appeal. *Idem.*

Issues.

4. Where an appeal is taken from a judgment of a justice of the peace to the district court, the case is to be tried in the latter court upon the same issues that were presented in the court from which the appeal was taken, with the exception of new matter arising after the trial. *Inglehart v. Lull*.... 758
5. Where the transcript from the justice court filed in the district court on appeal fails to show what issues were tendered in the justice court, parol testimony is admissible to show what issues were presented. *Idem.*

Fees.

6. The continuance of a cause by a justice of the peace, is no part of the trial of the cause, within the meaning of section 11, chapter 28, Compiled Statutes. *Stewart v. Doering*..... 298

Labor Commissioner. See STATE AND STATE OFFICERS.

Laches.

Delay in payment at tax sale. See TAXATION, 16.

Landlord and Tenant.

1. A farm lease providing for cash rent, but not expressly fixing the time of payment, contained a clause binding the landlord, in case of a crop failure or decline in prices, "to settle the payments of said rent as it becomes due to the best advantage for both parties concerned." In contemplation of the parties, the rent was not due before the crops were ready for the market. *Hubenka v. Vach*..... 170
See REPLEVIN, 8.
2. A tenant who leases land, enters into the possession thereof, cultivates it, raises the crops thereon, converts them to his own use, and is not disturbed in his possession by anyone claiming by paramount title, can not plead want of title in his landlord as a defense to an action for the rent. *Allen v. Hall* 256
3. When, pursuant to the terms of a lease, a landlord re-enters

Landlord and Tenant—Concluded.

because of a default in the payment of rent under a lease covenanting that in such case machinery placed upon the premises by the tenant shall be forfeited to the lessor, the former will succeed only to such title in such personal effects as the latter himself had. *Webster v. Bates Machine Co.* 306

4. Where a landlord enters under a lease on default, he succeeds to such title in machinery placed on the premises, which was to be forfeited to him on default, as the lessee himself had. *Idem.*

Leases. See LANDLORD AND TENANT.

Legislature.

Appropriations. See STATE AND STATE OFFICERS.

Licenses. See HAWKERS AND PEDDLERS. INTOXICATING LIQUORS. MUNICIPAL CORPORATIONS.

Enforcement of license tax by imprisonment. See CONSTITUTIONAL LAW, 6.

A classification of persons going from house to house vending their own products, and those who vend in the same way the products of others, for the purposes of an occupation tax, is based on a valid distinction. *Rosenbloom v. State.*.. 342

Liens. See ATTORNEY AND CLIENT. BAILMENT. DIVORCE AND ALIMONY. JUDGMENT, 4, 5. WAREHOUSEMEN.

Limitation of Actions. See ADVERSE POSSESSION. APPEAL AND ERROR, 49.

1. Where the breach of an indemnity bond is the payment of a judgment in conversion, the statute of limitations does not run against an action for damages upon such breach until the statutory time after the payment. *Benson v. Caulfield* 101
2. As between a bank and one of its depositors, the statute of limitations does not begin to run in favor of the bank until a demand has been made for the money on deposit. *Citizens Bank of Humphrey v. Fromholz*..... 284
3. Where an administrator fails to comply with a decree of the county court requiring him to pay over money found due on a final settlement, the statute of limitations does not begin to run against such breach of his bond till the final decree directing payment is entered. *Mortensen v. Bergthold* 208
4. When in the absence of any relation of trust or confidence, personal property is taken possession of tortiously or otherwise, the act alone is notice to the whole world of the nature and extent of the right, title or claim made by the party committing it; and if a person having an adverse claim thereto, fails to assert it or remains in ignorance

Limitation of Actions—Concluded.

- until after the lapse of the statutory period of limitations, his fault is his own and his right of action therefor is barred. There is no distinction in this respect between actions for the recovery of chattels and those for the recovery of real property. *Webster v. Bates Machine Co.*..... 306
5. In cases arising under the proviso of section 1 of the married woman's act, the cause of action does not arise, and the statute of limitations does not begin to run, until an execution upon a judgment against the defendant's husband has been returned unsatisfied. *Noreen v. Hansen*.... 858
6. A suit under section 117 of chapter 78, Compiled Statutes, can not be maintained after thirty days from the injuries complained of. *Swaney v. Gage County*..... 627
7. The statute of limitations does not run against a tax lien until five years after the right of action has accrued thereon. *Stevens v. Paulsen*..... 488

Loans. See PRESUMPTIONS.

Mail.

- Mailing to an insurance company a certificate required to be "sent." *Sovereign Camp of Woodmen of the World v. Grandon* 39, 43

Malicious Prosecution.*Actions.*

1. In an action for malicious prosecution of a criminal, or for an offense which imputes moral turpitude or want of integrity, it is competent for the plaintiff, in making his case in chief, to show his previous good character as bearing directly on the question of probable cause, where such reputation was known to the defendant, or was of such general notoriety that he will be presumed to have known it. *Bank of Miller v. Richmon*..... 111
2. The question as to what constitutes probable cause is a question for the court to determine, and not for the jury; that is, the court must determine, as a matter of law, whether the facts are of such a character as would warrant a man of ordinary prudence in filing a complaint. *Idem*.
3. Where in a suit for malicious prosecution the petition states that defendants charged plaintiff with a crime; and the affidavit making the charge is set out in full in such petition, and it merely stated that he was about to leave the state to avoid an examination concerning his property and to defraud his creditors, and in another part of the petition his acts are referred to as an "offense," there is no variance between pleading and proof. *Idem*..... 111, 114
4. A cause of action for alleged abuse of process and malicious

Malicious Prosecution—Concluded.

prosecution of a civil suit, based on an attempt to foreclose a certain mortgage in the federal courts, can not be set up by way of counter-claim in a subsequent suit to foreclose said mortgage. *President and Directors of Ins. Co. of North America v. Parker* 411

Termination of Prosecution.

5. Where a person is charged with being about to leave the state for the purpose of avoiding an examination concerning his property, and is arrested under the provisions of section 535 of the Code of Civil Procedure and brought before the county judge for examination, an order, made upon hearing, that there was not sufficient evidence to warrant the arrest of the accused, is sufficient to show the proceedings fully terminated so far as the question of malicious prosecution is concerned, although the record fails to show a formal discharge. *Idem*..... 111

Mandamus.*Adequate Remedy at Law.*

1. A party who complains that a trial judge has incorporated improper matter in a bill of exceptions has an adequate remedy at law, within the Code of Civil Procedure, section 646, so that mandamus to correct the record will not be granted. *State v. Fawcett*..... 496
2. The privilege of trying a suit in conversion in an action of replevin is not, in all cases, an adequate remedy at law. *Hopkins v. State*.....10, 15

Jurisdiction.

3. Considering the matter theoretically, and leaving practical results and past adjudications entirely out of view, it would seem that the farthest limit of judicial authority in mandamus proceedings against officers of the executive department, is to hear and determine; to give judgment, but not to enforce it by coercive process. *State v. Savage*..... 684
4. Where the affidavit, the alternative writ of mandamus and the return of the respondents thereto present no disputed question of fact for trial, and the case is properly submitted on the pleadings alone, a judge of the district court sitting at chambers has jurisdiction to allow the writ. *Hopkins v. State*..... 10

When Writ May Issue.

5. Mandamus will lie against a county treasurer to honor a warrant properly drawn upon a judgment-tax fund. *State v. Scott's Bluff County*..... 419
6. The principle of exemption from mandamus is grounded upon a distinct constitutional inhibition (Constitution, art.

Mandamus—Concluded.

- 2, sec. 1), and does not at all depend upon official rank. Whether the writ of mandamus should be granted or refused has been made to depend, in every case decided by this court, upon the character of the act in question and not upon the office of the respondent. *State v. Savage*..... 684
7. The established doctrine in this state is that when a law, in positive terms, enjoins upon the governor, or other officer of the executive department, a mere ministerial duty, leaving him no choice or discretion in regard to the matter—no judgment to exercise as to whether he will or will not act,—the writ of mandamus may issue, and its issuance is an appropriate exercise of judicial power. *Idem*.
8. Mandamus will lie to compel a warden of the penitentiary to allow the proper service and execution of a replevin process inside the penitentiary. *Hopkins v. State*..... 10

Marriage.

1. The relation of marriage is contractual only in a limited and qualified sense. *University of Michigan v. McGuckin*... 300
2. Marriage is a social status; capacity and free consent are all that is necessary. *Idem*.
3. The consent requisite to the creation of the marriage relation need not be expressed in any especial manner or by any prescribed form of words, but may be sufficiently evidenced by any clear and unambiguous language or conduct. *Idem*.
4. The main purpose of section 1 of chapter 52 of Compiled Statutes is to negative the idea, that marriage is an ecclesiastical sacrament legally controlled by dogma or regulated by ritual. *Idem* 300, 303

Married Women. See HUSBAND AND WIFE.**Master and Servant.** See INTOXICATING LIQUORS, 14-17.

1. In an action by an employee against his employer for damages for breach of contract, arising from his wrongful discharge of the former, the fact that the plaintiff obtained, or by the exercise of due diligence, might have obtained, other employment, is a matter of defense, which the plaintiff is not required to anticipate in his petition. *Wirth v. Calhoun* 316
2. In an action for wrongful discharge the burden of proof is on the defendant to show that the plaintiff might have obtained other employment. *Idem*.
3. In an action for wrongful discharge the measure of damages is the contract price. *Idem*.

Master and Servant—Concluded.

4. A master is affected by the acts of his servant only to the extent that they have been actually authorized. *Moore v. State* 557, 559

Maximum Rate Law.

Enforcement of. See CRIMINAL LAW AND PROCEDURE.

Monopolies.

Exclusive contract for removal of garbage. See MUNICIPAL CORPORATIONS, 7-10.

Mortgages. See ACKNOWLEDGMENT. ALTERATION OF INSTRUMENTS. CHATTEL MORTGAGES. EXECUTION. FRAUDULENT CONVEYANCES. REPLEVIN. SUBROGATION.

Assignment.

1. An assignment of a note secured by a mortgage operates as a transfer of the mortgage without a formal written assignment. *Snell v. Margritz* 6
2. A mortgage on realty is an incident to the debt evidenced by the notes it secures. *Frerking v. Thomas* 193
3. A mortgage passes as an incident with the assignment of the debt. *Idem*.

Foreclosure by Action.

4. A decree in foreclosure finding that no proceedings at law had been had to collect the debt held sustained by the evidence. *Enyart v. Moran* 401
5. The allegation in a petition for foreclosure that no proceedings have been had at law, need not be proved beyond the possibility of a contrary inference; a prima-facie case is sufficient. *President and Directors of the Ins. Co. of North America v. Parker* 411
6. An action at law for the rents and profits will not lie on behalf of a subsequent purchaser against a mortgagee who has entered the premises and retained the possession thereof under a provision that, in case of default, he shall be entitled to immediate possession of the premises; but such mortgagee will be held to account therefor in an action to foreclose his mortgage. *Felino v. Newcomb Lumber Co.* 335
See EXECUTION, 23.
7. Right of mortgagee who has conveyed his equity to intervene in foreclosure. *Pitman v. Ireland* 675
8. In an error proceeding from a decree of the district court foreclosing a real estate mortgage, an undertaking which does not provide for the payment of "the value of the use and occupation of the property" is not effective as a super-seedeas. *Collins v. Brown* 173

Mortgages—Continued.

Payment. Release.

9. When a debt secured by a deed absolute with parol defeasance is paid and the deed surrendered for destruction, the lien ceases. *Decker v. Decker*..... 239
10. Where the uncontradicted evidence shows that a deed, absolute in form, was in fact a mortgage, that the debt thereby secured had been discharged and the deed surrendered and destroyed, a finding by the trial court that the title vested in the grantee absolutely, and at her death descended to her heirs at law, can not be sustained. *Idem*.
11. A grantee of land subject to a mortgage thereon fraudulently obtained an assignment of the mortgage and released the same, the notes secured thereby being unsatisfied. *Held*, As against an indorser of the notes the release was unavailing. *Frerking v. Thomas*..... 193
12. In a suit to reinstate a mortgage on real estate fraudulently released and to enforce the lien created thereby, it was alleged that after the fraudulent release of the mortgage the notes secured by the same were transferred to a third party, and suit caused to be instituted against the payee on his liability as indorser, and that he was compelled because of such liability to pay for and take up such notes, which he did, giving the amount thereof. The answer alleged that if any money was paid thereon, it was paid to some other and different person, without the knowledge or procurement, in any manner, of the defendants. *Held*, In the face of such an allegation, the defendants could not be heard to say and prove that the payment so made was in compromise of the plaintiff's liability as indorser, and for their benefit, in that it was agreed that no action should thereafter be maintained against the maker of the notes, or to enforce the security pledged to the payment of the debt. *Idem*.

Transfer of Property Mortgaged.

13. Where land is sold subject to a prior mortgage the land, as between the parties to the transaction, is the primary debtor, and the incumbrance may be satisfied by sale. *Idem*.
14. A purchaser of real estate by quitclaim, with knowledge of an unrecorded mortgage, who shows by his answer that he had actual knowledge and that he caused inquiry to be made, as to the amount of the lien of such mortgage, by a person not an agent of the lien-holder, can not defeat a recovery of any portion of the mortgage debt, on account of a mistake in amount. *Enyart v. Moran*..... 401
15. A purchaser of land incumbered by a mortgage showing that it was given to secure a negotiable note paid the amount

Mortgages—Concluded.

of said note to the original mortgagee, there being no assignment of the mortgage of record, and secured from the mortgagee a release of the mortgage. *Held*, That in paying the original mortgagee before the note was due without demanding a surrender of the note, he assumed the risk that it might be held by someone other than the mortgagee.

Snell v. Margritz..... 6

Requisites and Validity.

16. In equity an unrecorded deed absolute in form, given to secure a debt with parol defeasance is a mortgage. *Decker v. Decker* 239

17. An instrument in writing, properly executed, which shows upon its face that it is intended to charge a lien upon real estate to secure the payment of a debt, is sufficient to constitute a mortgage in this state. *Iodence v. Peters*..... 425

18. A provision in a mortgage that, in case of a default, the mortgagee shall be entitled to immediate possession, is valid as to the parties, subsequent purchasers and incumbrancers chargeable with notice. *Felino v. Newcomb Lumber Co.*..... 335

Title.

19. A mortgagee, under a deed absolute in form with a parol defeasance, who goes into possession under an agreement that rents and profits shall go for his care and for taxes, can not acquire title by adverse possession. *Decker v. Decker*.. 239

Motions.

Motion for new trial. See APPEAL AND ERROR, 1, 21, 22.

Effect of motion to vacate judgment. See JUDGMENT, 6.

To strike. See PLEADING, 10.

Municipal Corporations. See COUNTIES AND COUNTY OFFICERS.

Assessments. Equalization.

1. The board of equalization remained in session only a portion of the day named in the notice; recess then taken at call of chairman; no meeting till nearly thirty days thereafter; final action at new meeting without further notice,—not a compliance with the law requiring a meeting of the city council as a board of equalization for at least one day, between the hours of 9 A. M. and 5 P. M.; and a special tax depending on such proceedings is void. *John v. Connell*, 233

2. Under the provisions of section 78, chapter 12a, Compiled Statutes, 1893, in order to sustain a levy of special taxes according to the foot-frontage of the lots of real estate within the tax district, it must affirmatively appear from the record that the council, sitting as a board of equalization, found that the benefits were equal. *Idem*.

Municipal Corporations—Continued.*Billiard and Pool Rooms.*

3. Under the provisions of section 46, and subdivision 12 of section 69, article 1, chapter 14, Compiled Statutes, 1901, village authorities have ample power by ordinance to license and regulate billiard and pool rooms. *Morgan v. State*..... 369
4. By subdivision 8 of section 69, article 1, chapter 14, Compiled Statutes, village trustees are authorized to raise general revenue by levying and collecting a license tax on persons engaged in conducting billiard and pool rooms. *Idem*.

Ordinances.

5. An ordinance whose main object is to license and regulate a business or calling is not wholly void because a provision imposing a small occupation tax is not clearly expressed in its title, as required by section 79 of article 1, chapter 14, Compiled Statutes, 1901. *Idem*.
6. Where an ordinance has been enacted for the double purpose of regulation and taxation, and the title is restrictive, the taxing clause may be stricken out without destroying or affecting in any way the regulating provisions of the ordinance. *Idem*..... 369, 370

Removal of Garbage.

7. Under the provisions of the charter act governing cities of the metropolitan class, the authorities thereof, for the purpose of protecting and preserving the public health, comfort and welfare, are empowered to enact by ordinance all necessary and reasonable regulations for the collection and removal of all garbage, filth and other noxious and unwholesome substances, ashes, stable manure, rubbish, and other waste and refuse matter accumulating in centres of population, and which, without such regulations, would become nuisances, menacing to the comfort and health of the inhabitants of such cities, and to license persons engaged in such occupation or business. *Hier v. Ross*..... 710
8. Such cities may also, as incident to the power of regulation, grant an exclusive privilege by contract to one person to collect and remove under its own immediate direction and control and in pursuance of regulations enacted for that purpose, those noxious and unwholesome substances which are nuisances *per se*, and a menace to the public health. *Idem*.
9. The section of the ordinance of the city of Omaha under consideration, *held* void and unenforceable because an attempted exercise of power in excess of the authority conferred by the charter governing such city. *Idem*.
10. It is not competent for the city, as a police regulation, to

Municipal Corporations—Concluded.

grant a monopoly to one individual, by contract, to enter upon the private premises of the inhabitants of the city, and at their expense collect and remove those innoxious substances, such as ashes, cinders, stable manure, or other substances not in themselves nuisances, but which if allowed to accumulate in unreasonable quantities would become such or which may be utilized for some beneficial purpose. Such an attempted exercise of power is in excess of the authority granted by the charter, an invasion of the personal and property rights of the citizens, in restraint of trade, and unnecessarily creates a monopoly. *Idem.*

Sidewalks.

11. The law makes it the duty of the officers of a city to exercise reasonable diligence for the purpose of knowing whether or not its avenues of public travel are reasonably safe, and they are not to wait for knowledge of defects or dangerous conditions of its sidewalks until these facts attain notoriety in the city. *Anderson v. City of Albion*..... 280
12. A city is bound to keep its streets and sidewalks reasonably safe and convenient for travel; and an instruction which charges the jury that, before a plaintiff can recover for injuries sustained by reason of a defect in a sidewalk, the jury must find "that said defect left the sidewalk in an unreasonably dangerous condition," is erroneous. *Idem.*
13. An instruction which in effect charges that the defect in a sidewalk must have been "notorious and continued," before the city can be charged with notice thereof, is erroneous. *Idem.*

Murder. See HOMICIDE.

Mutual Benefit Societies. See BENEFICIARY ASSOCIATIONS.

Names. See SIGNATURES.

Designation in an appraisal of parties as "et al." See EXECUTION, 4.

Necessaries.

Wife's liability for necessities furnished family. See HUSBAND AND WIFE, 9.

Negative Pregnant. See PLEADING, 10.

Negligence. See CARRIERS. GUARANTY, 2.

1. In an action for damages resulting from the alleged negligence of the defendant, when the evidence on the part of the plaintiff is such as to justify a finding that his own negligence contributed to the injury complained of, the burden of proof is on the plaintiff to show the absence of such negligence. *Chicago, B. & Q. R. Co. v. Featherly*..... 323

Negligence—Concluded.

2. On facts stated, the court erred in placing the burden of proof to establish contributory negligence upon the defendant. *Idem*.

Negotiable Instruments. See BILLS AND NOTES.**New Trial.**

Motion for. See APPEAL AND ERROR, 21, 22.

Opening or vacating judgment. See JUDGMENT.

1. A motion for a new trial must, in all cases except for newly-discovered evidence, be filed at the term at which the finding or decision sought to be vacated is rendered. *Harris v. Jennings*..... 80
2. A motion for a new trial can not be amended after the statutory time for filing such motion has expired, except upon a finding by the court that the party was unavoidably prevented from presenting the matter contained in the amendment within three days after verdict. *Gullion v. Traver*.... 51
3. Whether, in an action for injuries to the person, a new trial may not be granted on account of the "smallness of damages" where the testimony clearly shows that the damages awarded are grossly inadequate as compensation for the pecuniary injuries actually sustained, *quære*. *Carpenter v. City of Red Cloud*..... 126

Notaries. See ACKNOWLEDGMENT.**Notice. See CORPORATIONS, 2. VENDOR AND VENDEE.**

Of defects in sidewalks. See MUNICIPAL CORPORATIONS, 11-13.

Of foreclosure sale. See EXECUTION, 14.

Of tax sale. See TAXATION, 13, 14.

Taking possession of personalty on default of rent as notice.

See LIMITATION OF ACTIONS, 4.

Nunc Pro Tunc.

Amendment of record. See EVIDENCE, 2. RECORDS.

Objections. See APPEAL AND ERROR, 11. EXECUTION, 5, 6. INSTRUCTIONS, 9. PLEADING.**Offer.**

Of proof. See TRIAL, 6.

Office and Officers. See ACKNOWLEDGEMENT. ASSESSORS. BANKS AND BANKING. CORPORATIONS. MANDAMUS. QUO WARRANTO. STATE AND STATE OFFICERS.

A public officer is regarded as being in privity with his predecessor when both derive their authority from the same source. *State v. Savage*..... 684

Ordinances. See MUNICIPAL CORPORATIONS.

Parent and Child. See **ADOPTION.** **BASTARDY.** **FRAUDULENT CONVEYANCES,** 1.

1. An instruction in an action by a father to recover for the services of his minor daughter, *held* properly refused. *Crete Mutual Fire Ins. Co. v. Patz*..... 676
2. Evidence in an action by a father to recover for the services of his minor daughter, *held* sufficient to sustain the verdict. *Idem.*

Parties. See **TAXATION,** 15.

Designation in appraisal of parties as "et al." See **EXECUTION,** 4.
A misjoinder apparent on the face of the petition, is waived if not objected to before trial. *Goble v. Swobe*..... 838

Passengers. See **CARRIERS.**

Payment. See **BILLS AND NOTES,** 6. **CHATTEL MORTGAGES,** 2. **EMINENT DOMAIN.** **MORTGAGES,** 9-12. **SUBROGATION.** **TAXATION,** 16, 17. **TENDER.**

1. Where there is no evidence of any compliance with conditions of a payment made by a third party, *held* not error to instruct jury that defendants, to entitle themselves to credit for such payment, must show it was unconditional. *Hewitt v. Bank of Indian Territory*..... 463
2. A debtor has a right in paying money or transferring property to a creditor in satisfaction of his debts, to direct to which of several debts such transfer or payment shall be applied; and the creditor is bound to obey the direction of the debtor. *Murray v. Schneider*.....484, 486, 487
3. A purchaser of land incumbered by a mortgage showing that it was given to secure a note, there being no assignment of record, pays the original mortgagee at his peril. *Snell v. Margritz*..... 6

Peddlers. See **HAWKERS AND PEDDLERS.**

Penalties.

Construction of penal statutes. See **STATUTES,** 2, 3.
Failure to release mortgage. See **CHATTEL MORTGAGES.**

Penitentiaries.

Service on warden of writ of replevin. See **MANDAMUS,** 8.

Personal Injuries. See **CARRIERS.** **DAMAGES.**

From defects in sidewalks. See **MUNICIPAL CORPORATIONS,** 12.
Injury at railroad crossing. See **RAILROADS.**

Personnel.

Of officers of corporations. See **CORPORATIONS.**

Physicians and Surgeons.

Privileged communications. See **EVIDENCE,** 8. **WITNESSES,** 7-9.

Place.

Of sale. See EXECUTION, 20.

Taxing precincts. See TAXATION, 9, 10.

Pleading. See ABATEMENT AND REVIVOR. BILLS AND NOTES, 1. EJECTMENT, 2. FRAUD, 1. INDICTMENT AND INFORMATION. MASTER AND SERVANT, 1. QUO WARRANTO. TAXATION, 18.

Filing of cross-bill out of time. See JURISDICTION.

Defects and Objections. Waiver.

1. Where a demurrer to a petition is overruled, and an answer is filed by leave of court, "any possible error in the ruling is waived by answer." *Palmer v. Caywood*..... 372
2. Tendering answer and asking leave to file the same after the overruling of a demurrer to a petition, is a waiver of mere formal defects in the petition and of any irregularity in the time or manner of acting on the demurrer. *Bankers' Reserve Life Ass'n v. Finn*..... 105
3. Where an answer is faulty, but is traversed by a reply and treated by the plaintiff as sufficient, during the whole trial and proceedings, the court should refuse to instruct the jury that certain of the facts alleged in the petition were not denied in the answer. *Albion Milling Co. v. First Nat. Bank of Weeping Water*..... 116
4. An answer setting up facts which go to show a misjoinder of causes of action, but are also material to the merits, no specific objection being made to the misjoinder, will not be taken to raise such defeat. *Leavitt v. Mercer Co.*..... 31

Demurrer.

5. A general demurrer does not raise the question whether there is a defect of parties. *Holway v. American Exchange Nat. Bank*..... 67

Issues. Proof. Variance.

6. A reply which alleges "That the deed for the premises in controversy made and executed by defendant Rudolph Decker to the said Rose Ann Decker, was absolute, and was delivered to her by the said defendant without any conditions whatever attached thereto," puts in issue the question whether the instrument was a deed or a mortgage. *Decker v. Decker*..... 239, 247
7. Where it is alleged in the petition that the plaintiff is the owner and holder of the notes sued on, and it develops in the testimony that the notes were indorsed and delivered to the plaintiff as collateral security for an indebtedness, such allegation and proof do not constitute a variance. *Holway v. American Exchange Nat. Bank*..... 67, 71

Pleading—Concluded.

Plea or Answer.

8. A denial of the very words of the allegations of the petition, without denying their substance and effect, tenders no issue. *Knight v. Denman*..... 814
9. It is not error to refuse leave to file an answer setting up that the action was prematurely brought where the facts alleged were insufficient to sustain such plea. *Bankers' Reserve Life Ass'n v. Finn*..... 105

Reply.

10. A reply which denies "each and every allegation of new matter set up in defendant's answer" and "each and every part of same, except such allegations of said answer as may be admissions of plaintiff's petition," is subject to a motion to strike or make more specific; it is neither a general or specific denial; but is sufficient to prevent a judgment for defendant on the allegations of the answer. *Pecha v. Kastl*, 386

Police Power. See CONSTITUTIONAL LAW, 7. MUNICIPAL CORPORATIONS.

Possession. See ADVERSE POSSESSION. EJECTMENT.

The holder of the legal title to vacant lands, is deemed to be in possession thereof. *Horbach v. Boyd*..... 129

Precincts.

Taxing precincts. See TAXATION, 9, 10.

Preferences. See FRAUDULENT CONVEYANCES. TRUSTS.

Presentment.

Of claims against decedent's estate. See EXECUTORS AND ADMINISTRATORS.

Presumptions. See APPEAL AND ERROR, 23-27.

It would seem to be a warrantable presumption, based on common experience, that men who rely habitually, in business transactions, on the advice and judgment of persons representing adverse interests, seldom or never have money to loan. *Hare v. Winterer*..... 551

Principal and Agent. See BANKS AND BANKING, 5. BILLS AND NOTES, 6. INSURANCE, 13, 14, 17, 20. INTOXICATING LIQUORS, 14-17.

1. A principal can not accept the part of an unauthorized contract entered into by his agent which is beneficial to him, and repudiate the part which is to his detriment. *Hall v. Hopper*..... 633
2. Where a plaintiff sues on a contract entered into through an agent who apparently acted with general authority, he will not be permitted to show a limitation of that authority to his agent in making such contract, unless he proves that such

Principal and Agent—Concluded.

- limitation was known to exist by the defendant at the time the contract was entered into. *Idem*.
3. Agency can not be proved by the declarations of the alleged agent alone. *Dockarty v. Tillotson*..... 432
 4. An agent who contracts in his own name with respect to matters within the scope of his agency, is personally bounden notwithstanding the fact of such agency is known to the opposite party. *Idem*.
 5. An agency will not be presumed where none in fact exists. *Moore v. State*..... 557, 559
 6. Where a person through whose agency a loan had been negotiated, had rendered valuable services to the lender, in connection therewith, and there was no reason to suppose that the services were gratuitous, the court or jury will ordinarily be justified in presuming that the lender knew the borrower had been required to pay for such services. *Hare v. Winterer*..... 551
 7. Evidence examined and found to justify the conclusion of the trial court that an agent who had negotiated a loan acted for the lender and not for the borrower. *Idem*.

Principal and Surety.

1. A surety has a right to demand the application of collateral to the payment of his principal's debt; and the release of collateral is the release of the surety *pro tanto*. *Pierce v. Atwood*..... 92
2. If money is deposited upon such conditions that the creditor can require it to be applied upon his claim, and he consents that it be turned over to the principal debtor, without consent of the guarantor, the guarantor is thereby released. *Idem*.
3. It is elementary law that a creditor who by his voluntary act parts with security for his debt thereby releases a surety or guarantor, to the extent of the value of the security parted with. *Idem*..... 92, 93
4. An agreement by a surety that a creditor might extend time of payment on a note "pending the decision of the suit of George Canfield against Allen Rector, now in the supreme court of the state, or for not over two years from this present date," held to authorize an extension during the pendency of *Canfield v. Rector* in this court, but no longer. *McGavock v. Omaha Nat. Bank*..... 440
5. The rights of a judgment creditor are in nowise changed or modified by reason of the death of the judgment debtor and the sureties can not escape the obligation, or delay its enforcement, because of the death. *Palmer v. Caywood*... 372, 377

Privity. See OFFICE AND OFFICERS.

Process. See CORPORATIONS.

Service of writ of replevin. See MANDAMUS, 8.

Public Policy.

Contracts against. See HUSBAND AND WIFE, 4. SUNDAY.

Questions for Jury. See TRIAL.

Quieting Title. See EXECUTORS AND ADMINISTRATORS, 13, 14.

Quo Warranto.

1. In an action in the nature of a quo warranto by a private person to obtain possession of a private office, the relator must plead and prove facts entitling him thereto; but in an action by the attorney general, the burden is on the respondent to show this title. *State v. Davis*..... 499
2. Where in an action in the nature of a quo warranto, the title of the action shows the relator as a private person and the body of the petition, several times, refers to such person as relator, but such petition contains the following allegation: "F. N. Prout, attorney general of the state of Nebraska, who prosecutes in his own proper person and at the relation of Alvin Blessing, gives the court to understand and be informed," etc., the action is by the attorney general. *Idem*..... 499, 501

Railroads. See CARRIERS.

Condemnation of land for right of way. See EMINENT DOMAIN.

Enforcement of "Maximum Freight Rate Law." See CRIMINAL LAW AND PROCEDURE.

Action for injuries received at railroad crossing. *Held*, Error to place burden of proof to establish contributory negligence on defendant. *Chicago, B. & Q. R. Co. v. Featherly*... 323

Rebate. See INSURANCE, 10.

Receivers. See BANKS AND BANKING.

In an action by a receiver to enforce a stockholder's liability. misconduct of the receiver and his possession of unreported assets is no defense. *Brinkworth v. Hazlett*..... 592

Recognizances. See BAIL AND RECOGNIZANCE.

Records. See MANDAMUS, 1.

Of board of health as evidence. See EVIDENCE, 8.

Evidence *held* sufficient to support an order made to correct the journals by a nunc-pro-tunc entry. *Harris v. Jennings*, 80
See, also, EVIDENCE, 8.

Redemption. See TAXATION, 11.

Reference.

The unchallenged findings of fact by a referee, when confirmed by the court, are binding on the party, against whom they operate, and from the legal consequences flowing therefrom he can not escape. *Chicago Lumber Co. v. Bancroft*.. 176

Reformation of Instruments.

1. In order to justify reformation of a written instrument in any substantial particular the evidence of mistake must be clear, convincing and satisfactory. *Topping v. Jennette*.... 834
2. Extrinsic evidence, to justify the reformation of a written instrument, must be full, unequivocal and satisfactory; but the rule of reasonable doubt does not apply, and against such evidence the terms of the instrument alone will not prevail. *Idem*.

Release. See CHATTEL MORTGAGES, 2. MORTGAGES, 9-12. PRINCIPAL AND SURETY.

Rent. See LANDLORD AND TENANT. MORTGAGES, 6.

Replevin.

Pleading.

1. A defendant under a general denial may prove and recover for attachment liens upon property replevied. *Webster v. Keck*.....1, 2
2. A warehouseman's lien may be shown without pleading in an action of replevin. *Idem*.

Right of Action.

3. A mortgagee can not, because of his lien, maintain an action in replevin for the possession of property removed from the mortgaged premises which he claims as a fixture to the realty. *Moore v. Moran*..... 84

Service of Writ.

4. A sheriff holding a writ of replevin duly issued by a court of competent jurisdiction, may break open the state penitentiary to make service if the property claimed or any part thereof is concealed therein and he has been refused entrance; but he deserves commendation when he resorts to the courts for an enforcement of his rights. *Hopkins v. State*.....10, 13, 14

Trial. Judgment.

5. An action in replevin can proceed as one for damages, only in case the property can not be found, taken and delivered to the plaintiff, or when he can not give the statutory bond. *Idem*.....10, 15
6. Verdict held sufficient, under section 192 of the Code of Civil Procedure, to support a judgment for damages with interest, and costs. *Achenbach v. Pollock*..... 436

Replevin—Concluded.

7. A finding for defendant that only fixes his right of possession and the value of his interest is sufficient, if within the value of the property as shown by the evidence. *Webster v. Keck*.....1, 3
8. The plaintiff having failed to show a present right to the possession of the property in dispute, under either a general or special ownership, the court did not err in directing the jury to return a verdict in favor of the defendant. *Hu-benka v. Vach*..... 170

Reporter. See SUPREME COURT REPORTER.

Reprieve. See STATE AND STATE OFFICERS, 3.

Res Judicata. See ACTIONS, 2. JUDGMENT, 2.

1. The doctrine of *res judicata* is that a question once determined by a judgment on the merits, is forever settled, so far as the litigants and those in privity with them are concerned. The question decided is, while the decision stands, a sealed and closed question. *State v. Savage*..... 684
2. A judgment against a public officer in regard to a public right, binds his successor in office. *Idem*.
3. All litigants are affected by the rule of the thing adjudged; it is equally binding upon the sovereign and the citizen. *Idem*.
4. The former determination of this court that certain parties were entitled to hold the office of fire and police commissioners of the city of Omaha, under the appointment of the mayor and council of the city, is not binding on the governor, so as to prevent his appointment of commissioners under the provisions of the act for the incorporation of metropolitan cities. *State v. Savage*..... 702
5. The right of the parties in that litigation to the term in dispute therein is *res judicata*, but the principle of law announced, having been found erroneous and overruled, will not be followed. *Idem*.

Review. See APPEAL AND ERROR.

Revivor. See ABATEMENT AND REVIVOR. JUDGMENT.

Salaries. See COMPENSATION.

Sales. See EXECUTORS AND ADMINISTRATORS, 15, 16.

1. If a contract of sale is made expressly subject to the approval of the purchaser, or of someone for him, and such approval involves either judgment in matters of taste or personal opinion, the person whose approval is required is made the sole arbiter, and his decision is conclusive, provided he really passes upon the question and reaches a

Sales—Concluded.

conclusion honestly, whether right or wrong. *Thurman v. City of Omaha*..... 490

2. Where a party stipulates that his contract of purchase shall be subject to his attorney's opinion as to the legal status of the thing to be purchased, the plain purpose being to make his act dependent upon the personal opinion of his legal adviser, the sole requirement is that the legal adviser shall in fact pass upon the subject and give an honest opinion; and the merits of the opinion so given are not subject to review. *Idem*.
3. Where a purchase is conditioned on the opinion or decision of the purchaser, or someone for him, the requirement that such opinion must be reasonable and well founded is restricted to those cases in which the decision does not necessarily involve personal taste or opinion, so that any competent person can arrive at a satisfactory determination. *Idem*.
4. Though a contract of purchase makes the opinion of the purchaser's legal adviser control the fact of purchase and conclusive as to matters passed upon, the opinion rendered may be so unreasonable as to be evidence *per se* that it was not honest; but, before such conclusion can be adduced from the opinion alone, it must be so grossly and palpably at variance with the plain principles of law as to compel the conclusion that it is a mere pretense. *Idem*.

Scire Facias. See COSTS.

Service. See PROCESS.

Delivery of notice of appeal as service. See COUNTIES AND COUNTY OFFICERS, 1, 2.

Services.

Action by father for services of child. See PARENT AND CHILD.

Set-Off and Counter-Claim.

A cause of action for malicious prosecution in attempting to foreclose a mortgage in federal court, can not be maintained as a counter-claim or set-off in a suit to foreclose the same mortgage in a state court. *President and Directors of the Ins. Co. of North America v. Parker*.....411, 412

Settlement. See COMPROMISE AND SETTLEMENT.

Sheriffs, Constables and Coroners.

Authority of deputy sheriff in foreclosure actions. See EXECUTION, 7, 19.

1. The fact that an indemnity bond recites that the officer has been directed to levy upon property of a judgment debtor will not prevent a recovery, if he was actually directed to

Sheriffs, Constables and Coroners—Concluded.

- levy upon the property of a third party and does so at request of the principal in the bond. *Benson v. Caulfield*.... 101
2. A bond conditioned to indemnify the officer against all "harm, trouble, damage, costs, suits, actions, judgments and executions" growing out of the levy, is broken by the affirmation of a judgment in conversion and its payment by the officer. *Idem*.
 3. Where a bond is given to a sheriff conditioned to save him harmless on levy on certain property, and judgment is rendered against him for conversion, the fact that the judgment was paid by his surety does not impeach an allegation that the officer paid it, and the furnishing of the funds is a sufficient consideration for an assignment of the indemnity to the officer's surety. *Idem*.
 4. Money received by a sheriff, as the proceeds of a sale made by him under a decree foreclosing a real estate mortgage, is money received by virtue of his office. *Milligan v. Gallen*, 561
 5. A judgment for conversion of the proceeds of a judicial sale, may be recovered in an action in a suit upon the sheriff's bond. *Idem*.

Signatures. See WILLS.

Typewritten signature to petition in error. See APPEAL AND ERROR, 50.

Silence.

As evidence of guilt. See CRIMINAL LAW AND PROCEDURE, 1.

Specific Performance.

1. Specific performance of a parol contract will be enforced by a court of equity, where one party has wholly and the other party partly performed it, and its non-fulfillment would amount to a fraud on the party who has fully performed it. *Lucas v. Lucas*..... 190
2. Plaintiff brought an action for specific performance of a parol contract for the sale of real estate. The evidence disclosed full performance of its conditions by the vendee, and partial performance by the vendor, who had executed a conveyance of a part of the real estate included in the contract, but refused to convey the whole of it because of an alleged failure of a part of the consideration, to support which there was no evidence. *Held*, That the statute of frauds would not prevent a court of equity from decreeing specific performance. *Idem*.

Sporting.

—, as used in the statute making "sporting" on Sunday unlawful, applies exclusively to diversions of the field and outdoor sports. *Wirth v. Calhoun*.....316, 322

Stamp Tax. See INTERNAL REVENUE.

Stare Decisis. See RES JUDICATA, 4.

1. *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Nebr., 786, and *State v. Midland State Bank*, 52 Nebr., 1, limited. *State v. State Bank of Commerce*, 54 Nebr., 725, and *Morrison v. Lincoln Savings Bank & Safe Deposit Co.*, 57 Nebr., 225 adhered to. *City of Lincoln v. Morrison*..... 822
2. Questions disposed of in *Iowa Loan & Trust Co. v. Estate of Devall*, 63 Nebr., 826. *Haines v. Bellinger*..... 73

State and State Officers. See CONSTITUTIONAL LAW, 2, 3. MAN-
DAMUS, 7. RES JUDICATA.

1. The appropriation for the salary of the reporter and ex-officio clerk and librarian of the supreme court is made by section 25, article 16, of the constitution, and requires no special legislative enactment. *Weston v. Herdman*..... 24
See STATUTES, 5.
2. The act of 1887, imposing the duties of labor commissioner on the governor of the state, and providing for the appointment of a special deputy to assist in discharging them, is not in violation of section 26, article 5 of the state constitution. *State v. Eskeu*..... 600
3. Where a governor reprimands or respites a prisoner under death sentence, he may designate in the warrant of reprimand the day that the sentence shall be executed. *In re William Rhea*, *Coram SULLIVAN*, C. J. 885

Statute of Frauds. See SPECIFIC PERFORMANCE.

1. Any distinct and unambiguous act evidencing an intention by the seller to part with the possession and an intention on the part of the buyer to acquire the possession, accompanied by a tradition of the property from the premises of the former or from neutral ground to the premises of the latter, satisfies the statute of frauds and suffices to transfer the title, so that the former may recover the purchase price, if it remains unpaid, and the latter assumes the risk of safe-keeping and may defend his possession against all the world. *Gray v. Peterson*..... 671
2. A verbal contract with an agent or broker to sell land for the owner thereof, is void under the statute of frauds, and it requires the voluntary act of both parties thereto to execute it so as to completely take it out of the operation of the statute. *Allen v. Hall*..... 256

Statutes. See ADOPTION. ASSESSORS. CONSTITUTIONAL LAW. COURTS. CRIMINAL LAW AND PROCEDURE. DESCENT AND DISTRIBUTION. HAWKERS AND PEDDLERS. INTERNAL REVENUE. INTOXICATING LIQUORS. STATUTE OF FRAUDS.

Titles of ordinances. See MUNICIPAL CORPORATIONS, 5, 6.

Statutes—Concluded.

Construction.

1. It is settled doctrine that the courts will not declare an act of the legislature unconstitutional unless it is manifestly so. *Rosenbloom v. State*..... 342
2. A penal statute should not be extended beyond the plain import of its terms. *McCormick Harvesting Machine Co. v. Mills*..... 166
3. Punitive and remedial statute. *State v. Missouri P. R. Co.*, 679
4. It is a settled rule that in the adoption of the statute of a sister state the state adopting it adopts the construction which the former has placed upon it. *State v. McBride*, 547, 549
5. When foreign statutes are adopted by a legislature, they are adopted with the construction placed upon them by the highest tribunal of the state from whence they were taken. Dissenting opinion of SEDGWICK, J. *Rhea v. State* (Appendix)..... 889

Enactment.

6. A specific appropriation made by law within the meaning of section 22, article 3 of the constitution, is an appropriation made either by direction of the constitution itself or by the legislature under the forms and in the manner prescribed in the constitution. *Weston v. Herdman*..... 24

General and Special Laws.

7. A particular classification may be valid if the object of the statute is to raise revenue, and invalid if the object is regulation. *Rosenbloom v. State*..... 342

Subjects and Titles.

8. The amendatory act of 1897 to sections 2066 and 2068 of Cobbey's Consolidated Statutes, requiring assessors to procure certain labor statistics, is germane to the provisions of the original act, and to the requirement of the original section 2066, that the deputy commissioner collect statistics, and is not in violation of section 11, article 3 of the state constitution. *State v. Eskew*..... 600
9. Section 117, of chapter 78, Compiled Statutes, entitled "Roads," is an act complete in itself. *Swaney v. Gage County*..... 627
10. An act entitled "An act to provide a system of revenue," covers the entire subject of taxation, and comprehends whatever means or machinery the legislature may provide to enforce the payment of taxes. *Rosenbloom v. State*.... 342

Stay. See EXECUTION, 26.

Storage. See WAREHOUSEMEN.

Streets.

Defects in. See MUNICIPAL CORPORATIONS, 11-13.

Subrogation.

If land is sold under a senior mortgage and the junior mortgagee is permitted to redeem the same, after such redemption the purchaser is subrogated to the rights under the mortgage. *Milligan v. Gallen*..... 561

Summons. See PROCESS.

Sunday.

Sale of liquor on Sunday. See INTOXICATING LIQUORS, 14-17.

1. A contract whereby a party is required to furnish theatrical performances each day of the week, including Sunday, is not invalid as in violation of Criminal Code, section 241, providing that persons found sporting or at common labor on Sunday shall be punished. *Wirth v. Calhoun*..... 316
2. Criminal Code, section 241, providing for the punishment of persons found sporting on Sunday or at common labor, does not render a contract for theatrical performances on Sunday contrary to public policy. *Idem*.

Supersedeas. See APPEAL AND ERROR. MORTGAGES, 8.

Support.

Action for loss of support. See INTOXICATING LIQUORS, 1-4.

Supreme Court Reporter.

Salary of. See STATE AND STATE OFFICERS.

Taxation. See COUNTIES AND COUNTY OFFICERS, 8. INTERNAL REVENUE. LICENSES. LIMITATION OF ACTIONS, 7. STATUTES, 10.

Foreclosure of tax lien where owner is unknown as deprivation of property without due process of law. See CONSTITUTIONAL LAW, 4.

Collection.

1. Injunction will not lie to restrain the collection of taxes, unless such taxes are levied for an unauthorized or illegal purpose. *Union P. R. Co. v. Cheyenne County*..... 777

Constitutional Requirements.

2. Constitution, article 9, section 1, authorizing taxation of persons engaged in certain occupations by a general law, uniform as to the classes on which it operates, does not forbid reasonable classification of persons for the purposes of taxation. *Rosenbloom v. State*..... 342
3. Classification for the purposes of taxation, to be valid, must rest on some principle of public policy,—some substantial difference of situation or circumstances, which would suggest the justice or expediency of such classification. *Idem*.

Taxation—Continued.

Levy and Assessment.

4. Under the constitution, article 9, section 1, franchises of a corporation must be assessed for taxation without deducting corporate indebtedness. *State v. Karr*..... 514
5. That part of the revenue act (section 32), which requires the assessor to deduct the amount of corporate indebtedness from the actual value of the shares of stock, in order to determine what shall be assessed as capital stock, is unconstitutional and void. *Idem*.
6. Under revenue act (section 32), when capital stock has no market value, the "actual value," in the sense in which the words "capital stock" are used in the statute, is to be found by adding the value of the franchise to the value of the tangible property, from which should be deducted the value of the real and personal property. *Idem*.
7. Under the act incorporating metropolitan cities, section 63, it is the duty of the city council, sitting as a board of equalization, on proper complaint, duly filed, to hear evidence, consider questions as to comparative values and equalize assessments. *Idem*.
8. Revenue act, section 32, does not prevent the board of equalization from equalizing assessments, when property generally has been assessed at a certain percentage; and upon complaint that property or franchise is assessed at a less proportion of its value than the percentage of value employed as a basis generally, the board may equalize the assessments by duly raising that complained of. *Idem*.

Place of Taxation.

9. When a precinct is once established according to law, it retains its character and territorial integrity, so far as the assessment of property and levy of general taxes are concerned, until it shall have been divided, modified or changed by law. *Whelen v. Cassidy*..... 305
10. A pre-existing precinct in a village organized as a city, will for general revenue purposes remain unaffected until division into wards has been duly made. *Idem*.

Redemption.

11. By the constitution of this state, owners of real estate sold for taxes are guaranteed two years from the date of the sale within which to redeem, and the statute provides that a tax purchaser, or his assignee, shall not be entitled to foreclose his lien until after the time of redemption has expired. It follows that a petition seeking to foreclose a tax lien, which does not show that the land has been sold for taxes, and that at least two years have expired after the date

Taxation—Continued.

of the sale, does not state facts constituting a cause of action. *Iodence v. Peters*..... 425

Sales.

12. The county treasurer's certificate of tax sale is presumptive evidence of a sale to a purchaser named therein, and the burden is upon defendants to prove that the sale was made to someone else. *Leavitt v. Mercer Co.*..... 31

Notice.

13. Section 109, chapter 77, Compiled Statutes, requires the county treasurer, in his notice of a tax sale, to give a list of the land to be sold and the amount of taxes due thereon, but does not require the treasurer to include in the notice the amount of interest due on the taxes up to the date of sale. *Stevens v. Paulsen*..... 488
14. A description of land in a public notice in a proceeding to foreclose a tax certificate is sufficient, where the context of the notice shows clearly that land in this state is referred to, and there is but one tract in the state answering such description, although the description covers another tract situated in another state. *Leigh v. Green*..... 533

Parties.

15. Whether or not the holder of a tax certificate, instituting foreclosure proceedings, may join as defendants persons claiming some interest in the land, where the land itself is properly made a party, such joinder at most is irregular only, and will not affect the validity of the proceedings when attacked collaterally. *Idem.*

Payment at Sale.

16. The delay of a purchaser at tax sale in paying to the treasurer the taxes and costs due on the lands sold, owing to the inability of the treasurer, with the clerical force at his disposal, to make the sale in its regular order at an earlier date, does not invalidate a sale otherwise entirely regular. *Leavitt v. Mercer Co.*..... 31
17. The word "forthwith" in section 11, article 1, chapter 77, Compiled Statutes, means as soon as the county treasurer, in the reasonable course of the orderly conduct of the business of his office, is prepared to receive and properly receipt for the money to be paid. *Idem.*

Unknown Owner.

18. Where the owner of land on which a tax lien exists is not known to the holder of the tax certificate, and can not be found on reasonable inquiry, the certificate holder may make the land a party to the foreclosure proceedings; and in such case allegations in the petition and an affidavit for service of publication, on information and belief, to the effect

Taxation—Concluded.

that the owner is unknown, are sufficient against collateral attack. *Leigh v. Green*..... 533

19. Where the holder of a tax certificate is unable by diligence and inquiry in the neighborhood of the land to learn the whereabouts of persons appearing to have estates therein, or where he is unable to ascertain who have such estates, the owners are "not known" within the meaning of Compiled Statutes, chapter 77, article 5, section 4. *Idem*.
20. Compiled Statutes, chapter 77, article 5, section 4, relating to process in proceedings to foreclose tax liens, provides that wherever the owner is unknown, the action may be brought against the land itself. The term "owner" is not defined by lienholder, but by a person having an estate in the land. *Idem*.

Tax Title.

21. If, in a proceeding to foreclose a tax lien, the land itself is properly made a party, and jurisdiction is acquired by publication of notice, a sale under a decree of foreclosure creates a new and independent title, and bars all pre-existing interests or liens. *Idem*.

Tender.

Of proof. See TRIAL, 6.

Where the question of the sufficiency of a tender arises in the course of the trial of a cause, and it appears that such tender was rejected on specific grounds, other objections to the tender will not be considered. *Ricketts v. Buckstaff*.... 851

Time. See HIGHWAYS, 2, 3. INSURANCE, 1. LIMITATION OF ACTIONS.

Extension of time of payment. See PRINCIPAL AND SURETY, 4.

Filing of cross-bill out of time. See JURISDICTION.

Of accrual of rent. See LANDLORD AND TENANT, 1.

Of redemption from tax sale. See TAXATION, 11.

To commence proceedings in error. See APPEAL AND ERROR, 49.

To file motion for new trial. See NEW TRIAL.

To present claims against decedent's estate. See EXECUTORS AND ADMINISTRATORS, 10-12.

Title. See ESTOPPEL, 1, 5. LANDLORD AND TENANT. QUIETING TITLE. TAXATION, 21. VENDOR AND VENDEE.

To crops on foreclosure sale. See EXECUTION, 21.

To personal property on default of rent. See LANDLORD AND TENANT, 3.

Trespass. See POSSESSION.

Trial. See CRIMINAL LAW AND PROCEDURE, 3. INSTRUCTIONS. JURY.

Continuance as part of trial. See JUSTICES OF THE PEACE, 6.

Directing verdict. See FRAUDULENT CONVEYANCES, 8, 9. REPLEVIN, 8. TRIAL, 2.

Trial—Continued.

Examination of witnesses. See WITNESSES, 4.

Questions for jury. See FRAUDULENT CONVEYANCES, 7. INSURANCE, 3. INTOXICATING LIQUORS, 16. MALICIOUS PROSECUTION, 2. TRIAL, 2.

Conduct of Counsel.

1. When an admission of fact is made by counsel under a misapprehension, the court, in the exercise of a wise discretion, should grant relief. *German Nat. Bank v. Atherton*, 610

Questions for Jury.

2. It is error to submit to the jury a question which the court can judicially determine. *Royal Neighbors of America v. Wallace*..... 330
See INSURANCE.
3. Where there are no disputed facts, a peremptory instruction is proper. *McDonald v. Tootle-Weakley Millinery Co.*..... 577

Reception of Evidence.

4. When for the purpose of showing the interest of a witness, it has been proved that he is one of the obligors upon a statutory bond, the terms and obligations of which are matters of common knowledge, it is not error to refuse to admit the bond itself in evidence. *Thom v. Dodge County*, 845
5. It is reversible error to refuse to allow a defendant to introduce proof of the facts stated in its answer as a defense to the plaintiff's petition, on the ground of a defect in the name of the party defendant as set forth in said petition, where the court has previously overruled defendant's objections to jurisdiction over its person, and required it to answer. *Grand Lodge A. O. U. W. v. Bartes*..... 800
6. An offer of proof, not put in a deceptive manner, nor in language calculated to mislead, which is fairly susceptible of a construction rendering the evidence admissible, should be so construed, although a different construction might be put upon it, where it clearly appears from the record that the trial court did not proceed upon a correct theory in rejecting it. *Horbach v. Boyd*..... 129

Right to Open and Close.

7. Where petition, in vague terms and by reference to note, alleges that twelve per cent. per annum is a lawful rate of interest by statutes of Oklahoma and note sued on bears date in Oklahoma and interest at twelve per cent. per annum, and such allegation is denied, held not error to refuse opening and closing to defendants, who plead usury, but admit execution and delivery of note. *Hewit v. Bank of Indian Territory*..... 463

Trial—Concluded.

Waiver of Irregularities.

8. Error in placing a law case on an equity docket over objection, is waived by an express waiver of a jury trial.
Thomas v. Thomas..... 581

Trover. See CONVERSION.

Trusts. See BANKS AND BANKING.

Cestui Que Trust.

1. Where a trustee refuses to carry out the terms of a trust, the party or parties beneficially interested may maintain an action in their own right to enforce the trust, and to obtain the benefit thereof. *Goble v. Swobe*..... 838
2. In an action against trustees, evidence *held* sufficient to sustain a judgment for the balance in their hands in favor of the beneficiary of the trust. *Idem*.

Preferences. Following Trust Property.

3. Where the whole of a fund created by the moneys of a trustee and those of his beneficiary or a greater portion thereof than that representing the trustee's own money is used by an insolvent trustee in paying his debts, *cestui que trust* is not entitled to a preference over general creditors for the amount of his money so lost. *City of Lincoln v. Morrison*..... 822
4. Misappropriation of a trust fund does not entitle *cestui que trust*, merely as such, and for that reason alone, to a preference over general creditors of an insolvent trustee. *Idem*.
5. Property or assets of the insolvent trustee acquired before, or with the proceeds of property held before, the trust money came into his hands, and not in any way mingled therewith, are not subject to any lien or claim in *cestui que trust*, and the rights of the latter with respect thereto are those of a general creditor only. *Idem*.
6. In order to obtain a preference, *cestui que trust* must show that the estate, out of which he claims such preference, has been increased to some extent by the misappropriation of the trust property; and he is entitled to a preference to the extent of such increase only. *Idem*.
7. Where a trustee mingles trust moneys with his own funds, *cestui que trust* is entitled to a charge upon the whole; and so long as any portion of the mass into which the trust fund has entered remains in any form, it is subject to such charge, and may be followed and claimed. *Idem*.
8. The burden is upon *cestui que trust* to show that the trust money did in fact increase the estate out of which he seeks a preference, or is represented therein in some form. But

Trusts—Concluded.

- it seems that where such money has gone into the general estate of a trustee, who afterwards becomes insolvent, there is a presumption that it remains therein at his insolvency and the court will not say that it can not be traced or has wholly disappeared where the contrary may fairly be inferred. *Idem.*
9. It is presumed that moneys drawn out of a fund wherein the trustee has mingled his own money and that of *cestui que trust* are his own, and, so long as any portion of the fund so constituted remains, it may be followed, and the charge of *cestui que trust* thereon may be asserted. *Idem.*
 10. A change in the form of a portion of a fund in which money of the trustee personally and of *cestui que trust* has been mingled is not necessarily a withdrawal of such portion. When the trustee retains such portion and dissipates the remainder, the portion retained in the altered form is taken to represent such fund and may be claimed by *cestui que trust*. *Idem.*
 11. Where a portion of a fund made up of trust money and of individual money of the trustee is invested, and a profit results, *cestui que trust*, in following the trust money into the investment, may claim such profit as the proceeds of the original funds upon which he had a charge, at least to the extent of said charge upon the original fund. *Idem.*

Evidence to Establish Trust.

12. Parol evidence to establish a resulting trust, must be clear, unequivocal and convincing. *Doane v. Dunham*..... 135
- Columbia Nat. Bank v. Baldwin*..... 732

Typewriting.

Typewritten signature to petition in error. See **APPEAL AND ERROR**, 49.

Usury.

1. Evidence held insufficient to support plea of usury. *Hewitt v. Bank of Indian Territory*..... 463
2. A mortgagor who has conveyed lands by an unconditional deed of general warranty, is entitled to intervene for the purpose of pleading usury in an action to foreclose the mortgage. *Pitman v. Ireland*..... 675

Bonus.

3. A bonus or commission exacted by a lender's agent, which added to the interest raises it above the maximum legal rate, is usurious. *Hare v. Winterer*..... 551
- See, also, **PRINCIPAL AND AGENT**, 6, 7.

Usury—Concluded.

Forfeiture of Interest.

4. Where a debtor executes a note and a mortgage, for a loan of money for a lawful rate of interest, and, at its maturity, enters into a new contract with the lender for a further extension of the loan, which is tainted with the vice of usury and the lender, by agreement, retains the note and the mortgage as collateral security to the usurious contract, in a suit to enforce the mortgage security the lender is restricted in his recovery to the amount due on the indebtedness at the time of making the usurious contract, after which all interest is, by force of the statute, forfeited. *Chicago Lumber Co. v. Bancroft*..... 176

Vendor and Vendee. See FIXTURES.

1. A purchaser of land, with notice of title in third persons to buildings situated thereon, takes the real estate subject to the rights of such third parties in and to such structures. *Moore v. Moran*..... 84
2. A bona-fide grantee of real estate (without notice) on which is situate a building used as a residence and apparently a part of the freehold, will take title to the land, including such building, divested of a claim of ownership by a third party whose rights are based on an alleged purchase of such building from the grantor as chattel property. *Idem*.
3. A purchaser of real estate, who takes his title by quitclaim deed, with actual knowledge of the lien of an unrecorded mortgage thereon, and who shows by his answer that he has actual notice thereof, and who caused inquiry to be made as to the amount of the lien, can not afterwards claim that he is an innocent purchaser for value. *Idem*.
4. Where a person purchases real estate with knowledge of a third party's equitable lien thereon, or with the notice of such facts as would put an ordinarily prudent man on inquiry which, if pursued, would lead to such knowledge, such person can not be said to be a good-faith purchaser without notice. *Frerking v. Thomas*..... 193
5. Only an innocent purchaser can claim protection under a deed absolute with a parol defeasance after the debt thereby secured has been discharged. *Decker v. Decker*..... 239
See MORTGAGES.
6. Where a grantor remains in possession after a valid conveyance, his possession is presumed to be permissive and subordinate to the grantee. *Horbach v. Boyd*..... 129

Verification.

Petition to vacate judgment. See JUDGMENT, 9.

Waiver. See INSURANCE.

Admission in evidence of privileged communications. See WITNESSES, 8.

Misjoinder of parties. See PARTIES.

Of defects in pleading. See PLEADING, 1, 2.

Of defense of non-claim against estate. See EXECUTORS AND ADMINISTRATORS, 9.

Of errors required to be assigned in motion for new trial. See APPEAL AND ERROR, 21.

Of grounds of abatement. See ABATEMENT AND REVIVOR.

Of irregularities at trial. See TRIAL, 8.

Warden.

Of penitentiary. See MANDAMUS, 8.

Warehousemen. See BAILMENT.

An agreement to permit a tenant under an expiring lease to leave his goods in *statu quo* for a stipulated rent, payable monthly, with no right reserved to demand payment on removal, creates no lien. *Webster v. Keck*..... 1

Warranty. See INSURANCE, 24.**Wills.***Construction.*

1. Ordinarily, where a devise of real estate is couched in such language as to show an intention to vest title in the devisee immediately upon the will becoming operative, and attached to the devise are certain conditions, the compliance with and performance of which may accompany or follow the vesting of the title in the devisee, such conditions will be construed as conditions subsequent. *Smith v. Smith*, 563
2. A condition that the devisee—the testator's son—shall be baptized by a certain name and none other and that he shall maintain and be known by the name during his natural life, are conditions subsequent. *Idem*.
3. Conditions in a will that the devisee should be christened and baptised by a certain name, and none other name, and that he shall maintain and be known by that name during his natural life, are reasonable, such as a testator may lawfully impose, and enforceable. *Idem*.
4. The provisions and conditions of a will, like those of other contracts, are to be construed by the courts with the view of carrying out the intentions of the testator. *Idem*.

Compliance with Conditions.

5. The deceased, Thomas Smith, by his last will devised his real estate to a son near two years old, by the name of Finley Smith, by his second wife. The son had, before the execution of the will, been given the name Bertrand Smith. Attached to the devise were the conditions that the said

Wills—Concluded.

son should be baptized and christened Finley Smith, and none other name but Finley Smith, and that he should maintain and be known by that name during his natural life, and, if such conditions were not performed and complied with, the real estate devised should revert to the testator's other children (naming them), and their legal heirs. The evidence discloses that, while formal compliance had been had of the condition of the will as to the devisee being baptized and christened by the name of Finley Smith, that he had never maintained or been known by that name prior to the time he arrived at twenty-one years of age, when a contest arose as to his rights to the property under the said provisions of the will. *Held*, That by reason of such non-compliance, and the failure to perform the condition imposed by the terms of the will, that the title of the devisee to the property devised thereby ceased and terminated, and that such property reverted to the other children of the testator, and their heirs, according to the alternative provisions of the will. *Idem*.

6. It is the right of a testator to make such disposition of his property as accords with his own views and judgment, and he can impose such conditions—not in themselves unreasonable or in contravention of public policy or positive law—as to him seem proper. *Idem*.....563, 568

Execution.

7. When in a contest proceeding for the probate of a will, it is disclosed that the name of the alleged testator was affixed to the instrument in controversy by some person other than himself, it is incumbent upon the proponent to establish by unequivocal evidence that the deceased gave direction to such person for writing his name, consciously and explicitly and in the free and voluntary exercise of his faculties. *McCoy v. Conrad*..... 150

Witnesses. See AFFIDAVITS.*Competency.*

1. In a contest for the probate of a will, the heirs of the alleged testator are not disqualified by statute to testify. *McCoy v. Conrad*..... 150
2. A woman whose marriage with decedent was annulled during his lifetime because of the existence of a former husband at the time of the marriage, is a competent witness against his estate as to facts learned otherwise than by communications from deceased during the existence of marital relations. *Thomas v. Thomas*..... 581
3. The marital privilege applies to all communications made

Witnesses—Concluded.

by a man to a woman with whom he is innocently maintaining the relation of husband and wife, notwithstanding the relation is meretricious on her part. *Idem*.....581, 590

Examination.

4. The practice of permitting two counsel on the same side to examine a witness is not commended as a rule, but the privilege, nevertheless, rests solely within the discretion of the trial court. *Citizens' Bank of Humphrey v. Fromholz*, 284

Impeachment.

5. Where foundation is being laid for an impeaching question, the time is fixed the day before the question is asked and place is laid in a small village, both time and place are fixed with sufficient certainty. *Musfelt v. State*..... 445
6. In a suit against an alleged principal, if the defendant calls his alleged agent as a witness and induces him to testify that he never represented himself as an agent with regard to the transaction in dispute, such witness may be contradicted by proof of specific instances in which he did so represent himself. *Dockarty v. Tillotson*..... 432

Privileged Communications.

7. A physician may testify that he was called to attend a patient and to the number and dates of his visits, as these facts are not privileged under section 333 of the Code of Civil Procedure. *Sovereign Camp of Woodmen of the World v. Grandon*..... 39
See EVIDENCE, 8.
8. In a suit on a life insurance policy the physician of the deceased testified for the defendant, as to the time he attended the deceased during his last illness but was not allowed to testify as to his condition. On cross-examination he admitted that he had given a written statement to plaintiff that deceased was not seriously sick until the evening previous to his death, which statement was admitted as part of his cross-examination. *Held*, A waiver of privilege on the part of the plaintiff and that the defendant should have been permitted to re-examine the physician as to the condition of his patient. *Idem*.
9. Whatever information a physician may obtain by observing the condition and symptoms of a patient is privileged. *Idem*.....39, 46

Transactions with Decedents.

10. A conversation had with a deceased party to an action can not be given in evidence by one having an adverse interest in the subject of litigation. *Pierce v. Atwood*.....92, 94

Words and Phrases. See INTOXICATING LIQUORS, 6. TAXATION, 19.

1. "As our own." *Ferguson v. Herr*.....649, 666
2. "At the court house." *Peck v. Starks*..... 341
3. "Being transported over its road." *Chicago, R. I. & P. R. Co. v. Sattler*..... 636
4. "Capital stock." *State v. Karr*..... 514
5. "Common labor." *Wirth v. Calhoun*.....316, 320
6. "Conviction." *State v. Missouri P. R. Co.*.....679, 682
7. "Debt." *Rosenbloom v. State*.....342, 358
8. "Express and implied." *McCoy v. Conrad*.....150, 161
9. "Fine." *State v. Missouri P. R. Co.*.....679, 682
10. "Forthwith." *Leavitt v. Mercer Co.*..... 31
11. "If so stated in the decree." *Ferguson v. Herr*.....649, 655
12. "Made by law." *Weston v. Herdman*..... 24
13. "Means of support." *Gorey v. Kelly*.....605, 608
14. "Offense." *State v. Missouri P. R. Co.*.....679, 682
15. "Prosecution." *Idem*.
16. "Representative." *McCoy v. Conrad*.....150, 153
17. "Send." *Sovereign Camp of Woodmen of the World v. Grandon*.....39, 43
18. "Sporting." *Wirth v. Calhoun*.....316, 320
19. "Style." *Gorey v. Kelly*.....605, 608
20. "Support." *Idem*..... 605
21. "Unavoidable casualty or misfortune." *Hanson v. Hanson*, 506
22. "While being transported over the road." *Chicago, R. I. & P. R. Co. v. Sattler*.....637, 646, 647

Work and Labor.

Action by parent for services of child. See PARENT AND CHILD.

